Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VERLA M. WILEY, PETITIONER

v.

JAMES K. GLASSMAN, CHAIRMAN OF THE BROADCASTING BOARD OF GOVERNORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether *Burlington Northern v. White*, 548 U.S. 53 (2006) overruled the standard for retaliation used in *Forkkio v. Powell*, 306 F.3d 1127 (D.C. Cir. 2002). If not, must retaliation – in order to be actionable – now **both** "affect the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm (*Forkkio*, 306 F.3d at 1131) **and** have the effect of dissuad[ing] a reasonable worker from making or supporting charge of discrimination." *Burlington Northern*, 548 U.S. at 67-68. *See Wiley v. Glassman*, 511 F.3d at 161.

2) Whether, under either the Civil Rights Act of 1991 or *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989), a retaliation claim should be permitted to survive summary judgment when the employee demonstrates direct evidence of retaliation.

3) Whether summary judgment in the employer's favor is appropriate when the record demonstrates the employer's alleged nondiscriminatory justifications to be false. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149 (2000)("because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination."); *St. Mary's Honor Center v. Hicks*, 509 U.S 502, 511 (1993) ("The factfinder's disbelief of the reasons

put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290, 92 (D.C. Cir. 1998)(cited with approval in Reeves, 530 U.S. at 149)("we ... reject any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment").

4) Whether a court can grant all reasonable inferences to the non-moving party, and refrain from making impermissible credibility determinations when it fails to consider the record as a whole. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" and "Credibility determinations ... are jury functions"); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (courts must review "the record **as a whole**" on summary judgment); *Matsushita Elec. Indus. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (same).

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The District of Columbia Circuit decision affirming summary judgment is reported at *Wiley v. Glassman*, 511 F.3d 151 (2007).

The District Court opinions granting summary judgment are not published.

JURISDICTION

The Court of Appeals issued its decision on December 14, 2007. The order denying rehearing issued on March 12, 2008. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Fifth Amend. Const.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

F.R.Civ.P. Rule 56(c)

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

42 U.S.C. § 2000e-2(a)(1)

> It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-3(a)

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted,

or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

Ms. Wiley is an African-American woman whose career with the Voice of America began as a GS-2 clerk typist in 1966. In 1983,Ms. Wiley, the first U.S.-born African American female International Radio Broadcaster in English to Africa, was promoted to a GS-12 International Radio Broadcaster. Throughout the 1980's Ms. Wiley acted as Managing Editor for the show, *Nightline Africa*. Ms. Wiley has been the coordinator and host of the Americana section of *Africa World Tonight* since 1992. As the Americana coordinator, Ms. Wiley is responsible for the music, American culture, science, and development features found in *Africa World Tonight*'s back half. She was responsible for, *inter alia*, voicing the shows, gathering material for her show, organizing and assembling the show's content, developing themes, editing taped stories, developing stories and working with reporters.

Barry Maughan became the Chief of English to Africa in 1995. Throughout his tenure as the Chief, Maughan made frequent sexist comments and referred to himself as "Bwana" (A Swahili term commonly interpreted to mean "Master") and even had a plaque bearing the moniker "Bwana Barry" on his desk. Under Maughan's supervision, International Radio Broadcasters held both GS-12 and GS-13 positions. In fact, at the time of the events relevant to the present dispute, six of the non-supervisory International Radio Broadcasters were GS-13s.

On April 17, 1997, Ms. Wiley (along with two other female Broadcasters whose cases have since settled), met with Maughan to discuss discrimination in the workplace. During this meeting, Ms. Wiley asked Maughan for Managing Editor training and to be allowed to act as Managing Editor.

In July 1997, after Maughan failed to address these problems, Ms. Wiley wrote a letter to Evelyn Lieberman (Director, Voice of America), explaining the white-male-dominated nature and culture of English to Africa,[1] disparate treatment of women, discriminatory evaluations, the lack of women in supervisory roles, lack of training for women in management roles, discriminatory assignments, and a glass ceiling at the GS-12 level, under Barry Maughan. In addition, Ms. Wiley raised the fact that Maughan had denied her a promotion to GS-13.

The Africa Division Director (Maughan's first-level supervisor), Steven Lucas, made Maughan aware of the complaint to Ms. Lieberman. In September 1997, Ms. Wiley again asked Maughan for a promotion, and again he denied the request. Maughan subsequently denied Ms. Wiley's request to be promoted in early 1998.

Maughan told Ms. Wiley that she did not merit a promotion **because she did not have supervisory duties.** During his deposition, Maughan explained that to be promoted to GS-13, an employee needed **"to be able to carry out the functions of a managing editor and senior editor"**[2] (emphasis added).

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[1] Mr. Lucas, the Africa Division Director, and Barry Maughan's first-line supervisor, acknowledged in his sworn deposition that there was "male cronyism" in the Agency under his tenure.

[2] Maughan additionally believed that "outstanding" evaluations were necessary for promotion. As a result, he pressured Ms.

Despite Maughan's explanations, Maughan promoted Joseph DeCapua, a white male **with no supervisory duties** from GS-12 to GS-13 a year prior to Ms. Wiley's request for a similar promotion. Maughan explained that DeCapua's promotion was the result, not of increased duties or a successful desk audit, but of a "back-room deal" he made with Personnel.

Respondent argued below that **in order to act as managing or senior editor, the employee already had to be in a GS-13 position.**

Despite the initiation of EEO action in October 1997, Ms. Wiley's colleagues and supervisors pressured her to abandon her claims against Maughan by, among other things, disparaging Ms. Wiley to management and the union, and threatening a mass exodus from English to Africa.[3] This pressure eventually caused the

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Wiley's rating officer, Senior Editor Frederica Depew, into withholding an "Outstanding" performance rating for her in 1995. Ms. Depew wrote: "I could easily write an Outstanding for Verla and would have preferred to if you hadn't said you couldn't support it. It's just that I think she is so reliable . . . works so hard . . . gives herself so unstintingly."

[3] As examples of this behavior, on November 3, 1997, Todd Leventhal wrote the VOA ombudsman, the Personnel Director, and the Division Chief, threatening that, "If [Maughan] were to leave ... for any reason [it] would lead to a wholesale exodus of the most productive people in the service . . . The service ... would surely be destroyed." On the same day, November 3, 1997, Mr. Leventhal wrote to Alan Heil, the Program Director, warning: "a tremendous amount is at stake here. I sincerely hope, for everyone's sake, that those making the decisions on this issue have enough courage and sense to do the right thing."

On November 4, 1997, a petition supporting Maughan signed by several employees, including Senior Editor Frederica Depew, was provided to VOA management, which read, "We want to show support for Barry, to counter the current rash of EEO

Respondent to replace the first EEO investigator with an investigator who was friendlier to the Respondent.

Maughan knew of these efforts to retaliate against Ms. Wiley and to pressure her into dropping her claims of discrimination. In addition to Maughan, moreover, the Defendant's highest-level managers, including VOA Director Evelyn Lieberman, VOA Program Manager Alan Heil, the Africa Division Director, Steven Lucas, and the Ombudsman Bob Henry, were also aware of these activities. Instead of discouraging this intimidating behavior, however, the Defendant's managers permitted and endorsed it. Maughan even lauded his subordinates' efforts in a November 18, 1997 memorandum to Division Director Lucas, writing: "I can ... tell you that I have been touched by the heart-warming outpouring for me and my leadership by the many staffers."

In the same November 18, 1997 memorandum, entitled, "My Continued Tenure as Chief of English to Africa." Maughan demanded:

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actions against him ... we feel this problem needs to be dealt with and resolved immediately by management so a productive atmosphere can once again prevail."

On November 6, 1997, the same employees wrote a letter to the Ms. Wiley's union, accusing her of filing claims as a result of her own career frustrations and to harass Maughan out of his position. The letter concluded by asking the union to "take the appropriate action."

On November 16, 1997, Ms. Wiley's colleague, Bill Eagle wrote to Maughan, Depew, and DeCapua, advising Maughan to treat the situation like "a football game, a war or a chess game . . . something that takes LONG TERM strategic planning where you study your opponents weaknesses rather than something with a quick, clean solution."

> After all the disruption caused in the Branch by Verla Wiley [and her former co-plaintiffs], – and after all the personal and professional indignities and cruelties I've had to endure at their hands – **they should all be summarily dismissed**. You know it. I know it. But you and I also know this organization doesn't seem to be able to do the right and proper thing. However **a clear and unmistakable message has to be sent that this sort of behavior will not go unpunished. I would like you to make sure that signal is sent.**
>
> . . .
>
> In a perfect and just world, Verla Wiley and Kemi Southey-Cole should go ... It's been decided that won't happen. I'm reluctantly willing to live with that decision.

(emphasis added).

Maughan used that memo to announce a rotating Managing Editor position. Only men, **some of whom were GS-12 employees**, were appointed to the rotation. Maughan also discussed making training available to Ms. Wiley in the memorandum; but he insisted, "**This training cannot be managerial in nature**, [unless] **she shows a willingness to become a team player.**" (emphasis added).

Petitioner filed her civil action in 1999, and discovery continued in the case well into the next two years. During 2001, Ms. Wiley attended depositions of witnesses and co-plaintiffs in her case, pursuant to her understanding that she could do so under the Respondent's practice of permitting the use of administrative leave to attend depositions related to one's pending civil action.

Prior to October 5, 2001, when it issued its Deposition Leave Policy, Respondent permitted employees to attend depositions using administrative leave in court cases. In a February 15, 2001 email, the Respondent's Deputy General Counsel, Mr. William Ohlhausen, informed the then General Counsel, Carol Booker, that the Office of Civil Rights had a "liberal interpretation" of the rule regarding the use of leave for attending depositions.

In February 2001, based on the advice of Mr. Ohlhausen, Ms. McMenamin (the new Chief of English to Africa) informed Ms. Wiley that she could take the leave but that she would, "wait until the matter was checked out further before making a final decision on leave." Ms. Wiley subsequently used 72.4 hours of official time to attend depositions in her case.

Ohlhausen circulated a draft of the leave policy on April 23, 2001, five months before the final policy was announced. According to the Respondent, the April 2001 draft remained "virtually unchanged" after it was reviewed by the Office of Personnel and the Office of Civil Rights. Respondent never provided a copy of the draft policy to the Petitioner in discovery, and instead provided a copy to the trial court, *in camera*. The trial court never issued a decision with regard to why it did not share the draft with the Petitioner.

Despite the fact that the policy on official time remained unchanged after April 23, 2001, and that the impetus behind drafting the policy was Ms. Wiley's question to Mr. Ohlhausen, the Respondent never informed Ms. Wiley that its policy would prohibit her from attending depositions using official time. In the meantime, Ms. Wiley attended additional depositions in her civil action.

In early summer of 2001, before the new policy was published and despite the fact that no one had ever been disciplined for doing so, Personnel Specialist, Donna Grace, requisitioned Ms. Wiley's time and attendance records in order to discipline her for violating the Respondent's leave policy.

Eight months after Ms. Wiley set things in motion by asking the question about leave, in October 2001, the Respondent promulgated the new leave policy. The October 2001 policy included new provisions that had never been contained in any previous policy or agreement and provisions that were specifically tailored to the Plaintiff's civil action, namely paragraph (f), which reads: "If there are multiple plaintiffs in the lawsuit, an employee/plaintiff is entitled to official time to attend only his or her own deposition, but not those of the other plaintiffs or of non-party witnesses."

After learning that the new policy would be applied retroactively, Delia Johnson, the Director of Civil Rights, explained to General Counsel Carol Booker that the policy was new and should not be applied to Petitioner retroactively. Specifically, she stated: "If this was existing policy why did we not proceed with appropriate actions before the OCR policy was disseminated ... It is apparent from the circumstances that neither management nor the complainants were made aware that the existing policy was applicable."

In an attempt to convince Mr. Welch (the Personnel Director) that taking Ms. Wiley's leave was legitimate, Personnel Specialist Donna Grace informed Welch that OCR Director Johnson had always agreed that the new leave policy was consistent with the Respondent's prior practice and policies.

Welch and James Hagan, Labor-Relations Chief, also believed the policy was new, and Mr. Welch's conversations with Respondent's counsel reveal that even General Counsel Booker did not believe a policy existed prior to October 2001. In an October 5, 2001 email Hagan wrote, "Jack – This sounds like new policy." A contemporaneous hand-written note from Welch to Hagan reads "my conversation with C. West [Assistant General Counsel] left me with the impression that Carol [Booker, the General Counsel] didn't think there was a policy in VOA."

On October 15, 2001 Booker instructed McMenamin to charge Petitioner with annual leave for attending depositions. McMenamin's October 16, 2001 "memo to file," however, states that she "called Verla and told her that I received a note from [OCR Director] Delia [Johnson] telling me to go ahead with making the T&A adjustments."

Ms. Wiley's protected activities,[4] and the Agency's retaliation against her continued, even after Maughan's departure.[5] That retaliation included a significant reduction in responsibilities. In May 2002, McMenamin moved an editorial segment into Ms. Wiley's half of the *Africa World Tonight* Broadcasts. The imposition of the editorials reduced Petitioner's airtime by twenty-five percent (25%).

After a 39-year career at the Voice of America, Ms. Wiley retired from her position as an International Radio Broadcaster, largely due to the stress of

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[4] For example, Ms. Wiley filed an EEO complaint to challenge the Respondent's above-referenced retroactive taking of leave, in December 2001.

[5] Ms. Wiley regularly represented other employees in civil rights complaints against the Respondent after Maughan retired.

remaining in a hostile and retaliatory working environment. The stress Respondent had placed on her resulted in, among other things, physical and neurological manifestations of emotional distress. Ms. Wiley continues in her role as Union Vice President, but she is now required to have an escort wherever she goes, even to the restroom.

The Respondent has a historical practice of discrimination against U.S.-born African Americans. Petitioner began her career at the Voice of America in 1966 and has worked in the English to Africa branch since 1977. She has first-hand knowledge of the pattern and practice of discrimination not only in the unit, but also throughout the Respondent. It is common knowledge that in its 44-year history, the branch has had one U.S.-born African American Chief (GS-14) and only three U.S.-born African American International Radio Broadcasters at the GS-13 level. In the landmark case of *Hartman v. Albright* (no. 77-cv-02019), Voice of America was found to have engaged in systematic discriminatory hiring practices against women.

Ms. Wiley has been fighting for a jury trial for ten years. As a result of the lower courts' failure to abide by this Court's precedent with respect to retaliation and the summary judgment standards, Ms. Wiley has thus far been stymied in her exhausting efforts, despite the presence of direct evidence of retaliation and compelling, material facts about which there is genuine dispute.

The United States District Court for the District of Columbia had jurisdiction over the Petitioner's civil action pursuant to 42 U.S.C. § 2000e(f) (Title VII of the Civil Rights Act of 1964), as amended.

The D.C. Circuit Court of Appeals had jurisdiction over the Petitioner's Appeal pursuant to 28

U.S.C. § 1291. The District Court's Memorandum Order dated October 2, 2006 constituted a "final decision," which, together with the its May 6, 2005 Order adopting the Magistrate Judge's Report, disposed of all of the Petitioner's claims against the Respondent.

REASONS FOR GRANTING THE PETITION

Introduction

Petitioner seeks Certiorari to clarify the standard for actionable retaliation claims and to substantively reiterate the correct standards and considerations for deciding summary judgment motions.

Employment discrimination victims appear to be, inexplicably, disproportionately on the losing end of summary judgment battles. Petitioner believes that this is due to the fact that the courts are merely paying homage to the words of the summary judgment standards, without actually applying those standards as required by this Court's precedent.

For example, in Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 982, 1093 (2003), Miller discusses the fact that courts have "ignored the restraining passages in the Court's [decisions in *Anderson, Celotex and Matsushita*] and overstepped the boundaries set by the trilogy itself, transforming summary judgment from a limited purpose procedural tool designed to screen out cases not worthy of trial to the 'trial on affidavits that the Court itself warned against." *Id.* 1062-1063. Miller also addresses the confusion created by the Court's

failure to specify the "standard by which the moving party discharges its burden of showing the absence of a genuine issue of material fact" and the tension between the prohibition against judges weighing evidence and their obligation to both draw reasonable inferences in favor of the nonmoving party and to evaluate the nonmovant's evidence in light of the entire record. *Id.* at 1063-1064. He also focuses on the courts' propensity for encroaching on the factfinder's role in deciding Rule 56 motions. *Id.* at 1064.

Similar critics of the application of the summary judgment standards can be found in: Kevin Clermont and Stewart Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. Vol. 1, No. 2, 429-458 (July 2004) (a statistical study comparing civil rights litigants to all other civil litigants); John Bronseen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522, 540-543 (2007) (discussing the artificial pressure on courts to grant summary judgment motions); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 181–205 (2000) (criticizing applications of summary judgment that "press against tolerable constitutional limits"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 162–70 (1988).

Petitioner's case exemplifies how the summary judgment system and standards are used to prevent good civil rights cases from reaching a jury. For example, the D.C. Circuit ruled in Ms. Wiley's favor on nearly all of the legal arguments she presented, it then however, ruled against her on all counts based its failure to consider the record as a whole, to grant

inferences in Ms. Wiley's favor and to abstain from making credibility determinations.

1. The Court of Appeals Ignored Direct Evidence of Discrimination

Following Ms. Wiley's initial complaint to the Respondent's Office of Civil Rights, filed on October 6, 1997, Barry Maughan, Complainant's Supervisor, wrote to the Director of the Africa Division a memorandum entitled "My Continued Tenure as Chief of English To Africa." The memo, dated November 18, 1997, announced, among other things:

1) "After all the disruption caused in the Branch by Verla Wiley [and her former co-plaintiffs in the district court action] ... – and after all the personal and professional indignities and cruelties I've had to endure ... **they should all be summarily dismissed.**"
2) **"A clear and unmistakable message has to be sent that this sort of behavior will not go unpunished. I would like you to make sure that signal is sent.**
3) "In a perfect and just world, Verla Wiley and Kemi Southey-Cole should go ... It's been decided that won't happen. I'm reluctantly willing to live with that decision."
4) With respect to affording Ms. Wiley any training that she had requested, Maughan insisted, **"This training cannot be managerial in nature, but that certainly cannot be ruled out in the future if she shows a willingness to become a Team Player."**

(emphasis added).

In the same communication, Maughan announced a rotating Managing Editor position. Only men, **some of who were GS-12 employees** and others of whom were GS-13 employees, appointed to the Managing Editor and emergency back-up rotation.

Despite the strength of this direct evidence of reprisal, neither the District Court nor the D.C. Circuit Court of Appeals even mentioned it in any decision.

This Court has not defined what constitutes direct evidence of discrimination. The most often cited definition is Justice O'Conner's discussion in her concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (superseded on other grounds by the Civil Rights Act of 1991):

> [S]tray remarks in the workplace ... cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Petitioner's direct evidence suffers from none of the deficiencies about which Justice O'Conner warned. Maughan's diatribe is no stray remark: as the memorandum's title ("My Continued Tenure as Chief") suggests, this was Maughan's statement of the conditions under which he agreed to remain as Branch Chief. Second, the memorandum comes from the decisionmaker himself, the person who made, and denied, the appointments at issue in the complaint. Lastly, the statements appear in the same document

that announces the very rotating Managing Editor appointment at issue in this litigation. Therefore, the statements of Maughan's retaliatory animus are not unrelated to the decisionmaking process. Maughan's words are not only related to the decisionmaking process, **they are contemporaneous explanations of his actions**.

Despite the direct evidence of retaliation, the D.C. Circuit analyzed this case in accordance with the *McDonnell Douglas* burden-shifting regime. The D.C. Circuit required the Petitioner to demonstrate, by a preponderance of the evidence, that the Respondent's excuse was false and a pretext for discrimination, pursuant to *Reeves v. Sanderson Plumbing Supply Co.* 530 U.S. 133, 143 (2000). Ultimately, the D.C. Circuit held: "appellee offered a legitimate, nondiscriminatory reason for appellant's nonparticipation in the managing editor rotation and **appellant failed to prove that this reason was merely a pretext** for discrimination or retaliation proscribed by Title VII." *Wiley*, 511 F.3d 151, 158. (emphasis added).

The *McDonnell Douglas* burden-shifting regime was developed for the benefit of employees who do not have direct evidence of discrimination and is inapplicable to cases with direct evidence. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121)(1985)("the McDonnell Douglas test is **inapplicable** where the plaintiff presents direct evidence of discrimination ... the shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.")(emphasis added); *Seierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)(quoting the cited excerpt from *Trans World Airlines*).

Applied to a case where direct evidence is in play, the *McDonnell Douglas* system imposes an additional obstacle on an employee at the summary judgment level. This is because, in direct evidence cases, the plaintiff has already demonstrated what *McDonnell Douglas* was designed to elicit – that unlawful discrimination played a role in the decision at issue. When direct evidence is in play, the question of whether discrimination is present has already been answered.

Therefore, in direct evidence cases, the only issue to be decided is whether an affirmative defense exists and, if so, what effect the affirmative defense would have. This result would be the same under either 42 U.S.C. § 2000e-5(g)[6] or *Price Waterhouse*,[7] if – on remand – the District Court determines that *Price Waterhouse* remains the law for retaliation claims:[8]

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[6] Under 42 U.S.C. 2000e-5(g), when the employee "proves a violation under section 2000e-2(m) ... and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court" may still issue relief, although that relief is limited in nature.

[7] In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), the Court held that "Once a plaintiff in a Title VII case shows that [unlawful discrimination] played a motivating part in an employment decision, **the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [discrimination] to play such a role.**" (emphasis added).

[8] Courts have recognized that the Civil Rights Act of 1991 superseded *Price Waterhouse*, at least with respect to discrimination based on race, color, religion, sex or national origin. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

> [A]n employer may not meet its burden in [a mixed motive] case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, ... **The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.**

Price Waterhouse, 490 U.S. at 252 (emphasis added).

This question, whether the employer has met its burden to demonstrate that it would have taken the same action despite the existence of discrimination is for a jury to decide. And as such, the case should be remanded to the District Court for trial. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1987 (2007) (Stevens, dissenting) ("In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas*"); *King v. Hardesty*, 517 F.3d 1049, 1058 (8th Cir. 2008)("At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was a motivating factor in the defendant's adverse employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment."); *Wilburn v. Robinson*, 480 F.3d 1140, 1143 (D.C. Cir. 2007)("direct evidence of retaliation ... precluded summary judgment"); *Wright v. Murray Guard, Inc.* 455 F.3d 702, 711 (6th Cir. 2006)("If the plaintiff makes [the showing required by 42 U.S.C. 2000e-2(m)], **she is**

entitled to relief."); *Ezell v. Potter*, 400 F.3d 1041, 1051 (7th Cir. 2005) ("[employer's] statement that [it] had a plan to get rid of older workers and replace them with younger, faster workers is direct evidence of discriminatory intent and is sufficient evidence to allow [employee] to take his case to trial."); *Griffith v. City of Des Moines* 387 F.3d 733, 736 (8th Cir. 2004)("We have long recognized ... that a plaintiff may survive the defendant's motion for summary judgment in one of two ways. The first is by proof of 'direct evidence' of discrimination."); *Vesperini v. Shaw Contract Flooring Services, Inc.*, 315 F.3d 37, 41 (1st Cir. 2002) ("When an employee presents direct evidence of age discrimination, the employer must then either deny the validity or the sufficiency of the employee's evidence, **and have the jury decide** whether the employee has proved discrimination by a preponderance of the evidence, or prove that it would have made the same decision even if it had not taken the protected characteristic into account.")(emphasis added); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc.*, 273 F.3d 30, 35-6 (1st Cir. 2001) ("At [the summary judgment] stage, ... the question is whether the evidence, taken as a whole, creates a factual issue as to whether the demotion was **motivated** by age.")(emphasis added); *Starceski v. Westinghouse Elec.* Corp., 54 F.3d 1089, FN4 (3d Cir. 1995) ("direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of 'but for' cause or cause in fact.").

2. Whether summary judgment in the employer's favor is appropriate when the record demonstrates the employer's alleged nondiscriminatory justifications to be false.

The Respondent provided numerous false justifications for its treatment of Ms. Wiley. The following examples stand out and should have permitted her to survive summary judgment.

a. Denied Promotion

The Respondent's first excuse for failing to promote Ms. Wiley to a GS-13 position was that she did not have any supervisory duties associated with her position. This explanation was false. The Respondent has admitted that its GS 13 positions may be supervisory or nonsupervisory. Moreover, despite Maughan's explanation that having supervisory duties meant both acting as the Managing Editor and Senior Editor, Maughan promoted a white, male colleague with no prior EEO activity to a GS-13 position even though (conceded by Maughan in his deposition) that the employee lacked of supervisory duties prior to his promotion. In addition, the Respondent argued before the D.C. Circuit that only GS-13s were eligible to act as either Managing Editor or Senior Editor, additionally contradicting Maughan's explanation an employee had to have either Managing Editor or Senior Editor duties **before** being eligible for a promotion to GS-13.

The Respondent's second excuse for failing to promote Ms. Wiley – and the reason on which the D.C. Circuit focused – was that she refused to undergo a desk audit, which was (according to the Respondent) the only manner for an employee to be promoted

noncompetitively. The Respondent provided no facts in support of this allegation, however. The Respondent's citations to the record were devoid of any evidence that any person was required to undergo a formal desk audit prior to receiving their accretion of duties promotion. In fact, Ms. Wiley who has received numerous accretion of duties promotions in her rise from a GS-2 Clerk Typist to GS-12 International Radio Broadcaster, has never been required to undergo a formal desk audit.

To additionally contradict the Agency's excuse, Ms. Wiley demonstrated that the desk audit idea came months after Maughan denied her promotion, illustrating that there was no causal nexus between the denied promotion and Ms. Wiley's decision not to sit for a formal desk audit. She also presented evidence that Maughan had referred (in his sworn deposition testimony) to Mr. DeCapua's promotion as having been the result of a "backroom deal." Additionally, the Petitioner demonstrated that Maughan's supervisor (the Director of the Africa Division) had testified that Maughan had the authority to promote employees subject to advice by Mr. Lucas and a review by Personnel for availability.

b. Managing Editor Rotation

The Respondent's first explanation for denying Ms. Wiley a role as Managing Editor was that only GS-13 employees were eligible to act as Managing Editor. Ms. Wiley earned no credit for demonstrating this reason to be false and demonstrating that two of the male employees that Maughan appointed to the rotation were GS-12s.

The second explanation was that Ms. Wiley's union duties took up so much of her time that she would

not have been able to maintain her obligations under the rotation. This excuse is simply untrue. Ms. Wiley's rating officer, Senior Editor Frederica Depew, wrote in a 1995 email to Maughan:

> Barry – this is in response to your query about Verla's schedule, union activities, partnership meetings, etc. and how they affect the office: ... The short answer is – **not at all**. They have no affect on the amount of work she does or it's quality. ... **I've known many people who took their jobs and their responsibility seriously, but I've never known anyone who does so to the extent that Verla does.** For years now I've received scripts sent in the computer late at night or over the weekend indicating that she's been working on her own time. And yet never has she asked for comp time, even in days past when comp time wasn't hard to come by. ... If Verla followed the letter of the law, we would be filling in for her all the time – again, not just because of her union work, but also because of sick leave and annual leave. We're by far the winners in this arrangement.

(emphasis added).

The inclusion of false explanations for the Respondent's failure to promote Ms. Wiley and failure to include her in the Managing Editor rotation creates genuine issues of material fact sufficient to survive a motion for summary judgment. Even if the Respondent provided additional reasons that were not demonstrated to be false, the fact that false excuses were asserted in the first place begs the obvious

question: if there were legitimate reasons, why would the Respondent dissemble?

This Court held, in *Reeves* 530 U.S. at 147-148:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Similarly, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) this Court held:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required[.]"

Likewise, in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1290, 92 (D.C. Cir. 1998)(a decision endorsed and cited with approval in Reeves, 530 U.S. at 148), the D.C. Circuit Court of Appeals held that the belief that "employment-discrimination plaintiffs must as a routine matter do more than discredit the employer's explanation in order to avoid summary judgment" is incorrect and "inconsistent with *Hicks*, which makes clear that 'no additional proof of discrimination is required' as a matter of course once a plaintiff has shown that a jury could reject the employer's proffered explanation." *Id.* at 264 (quoting *Hicks*, 509 U.S. at 511).

Thus, under *Reeves*, the combination of a *prima facie* case and evidence that the employer's asserted justification is false, while "not always" adequate to avoid summary judgment, is sufficient to "permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves* 530 U.S. at 148. The *Reeves* Court only envisaged cases where "the record **conclusively** revealed some other, nondiscriminatory reason for the employer's decision, or if the **plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred**," as still being amenable to summary judgment." *Id.* (emphasis added).

Permitting an employee to avoid summary judgment when the employer asserts false justifications for its action is also consistent with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)("the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). This is because, when the employer dissembles about the

reason for its actions, it is a justifiable inference that it is doing so to cover up its guilt. *See Reeves*, 530 U.S. at 147 ("the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.").

Relying on *Reeves* and this line of reasoning, Judge Posner of the Seventh Circuit Court of Appeals opined, in *Forester v. Rauland-Borg Corp.*, 453 F.3d 416, 417 (7th Cir. 2006):

> As we have said countless times, the question in a discrimination case is not whether the employer's stated nondiscriminatory ground for the action of which the plaintiff is complaining is correct but whether it is the true ground of the employer's action rather than being a pretext for a decision based on some other, undisclosed ground. ... If it is not the true ground, the employer may still be innocent of discrimination; he may for example have lied to conceal a reason that was discreditable but not discriminatory. **But the case could not be resolved on summary judgment**, because a trier of fact (judge or jury) would be entitled to infer a discriminatory motive from the pretextual character of the employer's ground.

(emphasis added).

The Petitioner respectfully requests that this Court accept Certiorari to clarify that in Title VII cases, while an employee is not entitled to judgment as

a matter of law when it demonstrates the employer's justifications to be false, the employee does establish genuine issues of material fact necessitating trial by doing so, unless the employer can provide "conclusive," "abundant" and "uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

3. Whether a court can grant all reasonable inferences to the non-moving party, and refrain from making impermissible credibility determinations, when it fails to consider pertinent record evidence provided by the non-movant.

a. Managing Editor Rotation

The D.C. Circuit concluded that Ms. Wiley's union activities would have prevented her from participating in the Managing Editor rotation and that she would not have accepted the assignment had it been offered to her. The Circuit Court opined: "[A]ppellant does not really contest Respondent's contention that she was too busy with her union duties to serve as managing editor. We therefore hold that Respondent offered a legitimate, nondiscriminatory reason for Appellant's nonparticipation in the managing editor rotation." *Wiley*, 511 F.3d at 158.

The evidence before the D.C. Circuit, taking the entire record into consideration – as required by *Reeves*, 530 U.S. at 151 (Courts must review "the record as a whole" on summary judgment) – was that although: 1) in 1997, Ms. Wiley was the Union Vice President; and 2) in 1989, she gave up Managing Editor type duties for the show *Nightline Africa* because she

was newly appointed and specific events required her to devote a significant amount of time to her union duties; 3) Ms. Wiley made numerous requests in 1997 for Managing Editor duties; 4) she was never asked if she would be able to maintain both Managing Editor and Union Vice President duties in the 1997 period; 5) the Senior Editor believed that Wiley had never permitted her union obligations to get in the way of work performance; 6) the Managing Editor position was a rotating one, making it easier to accommodate her union responsibilities; and 7) in his November 1997 memorandum (in which the Managing Editor rotation was announced), Maughan provided direct evidence of retaliation against Ms. Wiley and indicated that she could only receive training that was managerial in nature if she showed she could be a "team player."

Instead of believing the evidence of the non-movant and granting the reasonable inferences from these facts (i.e., (1) that since Ms. Wiley's request for Managing Editor duties was legitimate and; (2) that she would have accepted the assignment if it had been offered to her), the D.C. Circuit weighed the evidence before it and made the **credibility determination** that Ms. Wiley's requests for Managing Editor duties was really a sham. This was in clear violation of *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

The D.C. Circuit achieved this decision by violating another tenet of summary judgment law, which is that the court is required to consider the

record, as a whole, before granting a motion for summary judgment. *See*, 530 U.S. at 150 ("under Rule 56, we have stated that the court must review the record 'taken as a whole.'"); *Anderson*, 477 U.S. at 255 ("the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding ..."); and *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole ...").

For example, the D.C. Circuit never once acknowledged: 1) Maughan's November 1997 memorandum, which includes the direct evidence of retaliatory animus); 2) Ms. Wiley's explanation that specific circumstances led her to give up her Managing Editor duties in 1989; 3) that Ms. Wiley had asked repeatedly for Managing Editor duties in 1996 and 1997; 4) that Maughan testified that he never asked Ms. Wiley if she could perform the duties while acting as Union Vice President; and 5) that the Senior Editor confirmed that Ms. Wiley never let her union obligations interfere with her broadcasting work.

It would be, and is, easy for a court to grant summary judgment if it can ignore the evidence that favors the non-moving party, and the lower courts must be reminded of their obligation to consider all of the evidence in the record before granting summary judgment.

b. Denied Promotion

The D.C. Circuit likewise disregarded important evidence of record with respect to Petitioner's denied promotion claim.

The Court dispatched Ms. Wiley's denied promotion claim, concluding: "Appellant never proved that the duties and responsibilities of her job had

increased so as to warrant an accretion of duty promotion." *Wiley*, 511 F.3d at 157. This holding presumes that the Agency's policy required the Agency to verify, by way of a desk audit, that the employee's responsibilities had increased sufficiently to merit an accretion of duties promotion.

This conclusion, while appearing to be tied up with a bow, is absolutely bereft of any supporting facts and actually contradicts the evidence in the record. Among other ignored facts, it disregards the following: 1) Maughan denied Ms. Wiley a promotion long before the desk audit option was offered to her, and therefore there was no nexus between the initial denied promotion and the rejected desk audit; 2) there is no evidence in the record demonstrating that any employees in English to Africa were required to go through a desk audit; 3) Maughan explained that DeCapua (about whom the D.C. Circuit concluded, [t]here is clear evidence in the record to indicate that DeCapua's job responsibilities had grown over time") did not have supervisory duties at the time of his promotion, which Maughan indicated was necessary for promotion; 4) Maughan indicated that DeCapua's promotion was the result of a "back-room deal" not a desk audit;[9] and 5) the Africa Division Chief, Steven Lucas, testified that Maughan had the authority to make promotions, subject only to advice by Mr. Lucas and a review by Personnel **for availability**, and not for verification of additional duties.

The D.C. Circuit managed to make its erroneous ruling by disregarding the record facts that support Ms. Wiley's claim. Doing so, while making it fairly easy to

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[9] Had a desk audit been conducted, there would have been no need for any back-room deal.

avoid granting summary judgment on the denied promotion claim, violated one of the basic tenets of this Court's summary judgment precedent, that the courts consider the record as a whole before granting summary judgment. *See Reeves* 530 U.S. at 150 ("under Rule 56, we have stated that the court must review the record 'taken as a whole.'"); *Anderson*, 477 U.S. at 255 ("the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding ..."); and *Matsushita*, 475 U.S. at 587.

Moreover, with respect to the denied promotion, Respondent failed to move for summary judgment on the issue of Ms. Wiley's **retaliatory** non-promotion. Notwithstanding this both the District and Circuit Courts granted summary judgment on all claims related to the denied promotion **without** analyzing the retaliation claim.

The VOA has waived any argument it has – by way of summary judgment – concerning Ms. Wiley's claim for retaliatory non-promotion. An Appellee cannot raise a new issue – never before heard at the District Court level – in an appeal. *See Woodruff v. Peters*, 482 F.3d 521, 527 (D.C. Cir. 2007); *Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 277 (D.C. Cir. 1993)(issue not raised before the District Court – a *pro se* litigant's right to attorney's fees – was waived on appeal).

c. Retroactive Taking of Leave

The D.C. Circuit approached Ms. Wiley's claim for retroactive taking of leave with a similarly impaired view of the evidence in the record

The Circuit Court determined that Ms. Wiley was not entitled to administrative leave to attend depositions in her case and that, as a result, she suffered no adverse action when she was retroactively charged with leave. This determination presupposed that – at the time she took the leave – the Respondent had a practice or policy of denying the use of administrative leave for a District Court litigant to attend depositions in her case.

The court held that Ms. Wiley "can hardly claim retaliation when she has not shown that she was entitled to paid leave. The October 2001 guidelines may have clarified the situation, but they did not cause appellant to lose anything to which she was entitled before the guidelines were issued." *Wiley*, 511 F.3d at 159.

Here again, however, the Panel failed to consider the record as a whole and failed to decide all reasonable inferences in Ms. Wiley's favor. According to Ms. Wiley, it was common practice for employees to use administrative leave to attend depositions in their civil actions. But Ms. Wiley' case was not built on her testimony alone. The record contained numerous contemporaneous notes and correspondence from the Director of Personnel, the Employee/Labor Relations Branch Chief, the Deputy General Counsel and the Director of Civil Rights, all of whom indicated that the policy requiring an employee to take annual leave to attend depositions in his or her court case was a new one and that the old policy had been interpreted "liberally," consistent with Ms. Wiley's understanding.

Based on the foregoing, Ms. Wiley was entitled to the justifiable inference that the Respondent's prior policy permitted her to use administrative leave and that she was charged with annual leave, retroactively

after the **new** October 2001 policy was published. *Anderson*, 477 U.S. at 255 ("the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" and "Credibility determinations ... are jury functions").

The D.C. Circuit again achieved the decision against Ms. Wiley by simply ignoring the evidence that was in her favor. The Circuit Court's decision bears not one mention of the correspondence that demonstrates the internal debate – among the Respondent's Personnel Director, its Chief of the Employee and Labor Relations Branch, its General Counsel and its Office of Civil Rights – as to whether the October 2001 policy was new or not. By failing to consider the whole record and grant this inference to Ms. Wiley, the Panel's decision conflicts with *Reeves*, 530 U.S. 133, *Matsushita* 475 U.S. 574, and *Anderson*, 477 U.S. 242.

d. Retaliatory Harassment

The D.C. Circuit held that, since Ms. Wiley conceded her hostile work environment claim, she must also have conceded her retaliatory harassment claim. The D.C. Circuit again failed to consider the entire record in making this ruling.

Ms. Wiley's Complaint included a gender-based hostile environment claim. Because the gender-based conduct consisted of, albeit extremely distasteful and demonstrative of Maughan's discriminatory attitude toward women, isolated incidents that did not amount to severe or pervasive conduct under *Faragher v. Boca Raton*, 524 U.S. 775, 787-788 (1998), Ms. Wiley conceded the gender-based hostile environment claim and instead argued that all of the incidents about which she had complained in her complaint (not merely the events

that supported the gender-based harassment claim), considered together, constituted a hostile environment based on retaliation.

The D.C. Circuit held that the Respondent was on notice of the retaliatory harassment claim and reversed the District Court, which had stricken the claim, only to dismiss the retaliatory harassment claim, holding: "Because there is no claim here that the District Court erred in granting summary judgment on appellant's hostile environment claim, appellant's retaliatory harassment claim necessarily fails as well." *Wiley v. Glassman*, 511 F.3d at 160.

Had the D.C. Circuit considered "the record as a whole," it would have been forced to acknowledge that the retaliatory harassment claim included many actions that were not encompassed in the gender-based hostile environment claim. These included: 1) The Denied Promotion to GS-13; 2) Maughan's refusal to allow Ms. Wiley to act as Managing Editor; 3) Maughan's refusal to provide Ms. Wiley with On the Job Training for the Managing Editor position; 4) the retroactive taking of leave; 5) the reduction of Ms. Wiley's air-time responsibilities; 6) petitions that were encouraged by Maughan and written and distributed by coworkers to higher-level management; 7) attacks on the Petitioner submitted to her union management; 8) letters and speeches encouraged by Maughan and made to upper level management; 9) contributing to a slanderous newspaper article; 10) an assault on Ms. Wiley's former co-plaintiff, Kemi Southey-Cole; 11) hiring an attorney to investigate Ms. Wiley's activities; and 12) and the Respondent's cancellation of an independent discrimination investigation.

The Circuit Court's conclusion that the fate of Ms. Wiley's retaliatory harassment was necessarily tied

to her gender-based retaliation claim is another result of the D.C. Circuit's failure to consider the record as a whole as required by *Reeves*, 530 U.S. 133 and *Matsushita* 475 U.S. 574 (1986) and *Anderson*, 477 U.S. 242 (1986).

4. The Panel Relied on an Overruled Standard for Determining Actionable Retaliation

The last question presented relates to the Respondent's retaliatory reduction of Ms. Wiley's airtime by approximately twenty-five percent. After reversing the District Court's dismissal of this claim, the D.C. Circuit granted summary judgment in the Respondent's favor in reliance on an overruled standard for analyzing retaliation claims.

The Panel invoked the D.C. Circuit's decision in *Forkkio v. Powell*, 306 F.3d 1127 (D.C. Cir. 2002) and held that "an employee suffers an adverse employment action if he experiences **materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm.**" *Wiley v. Glassman*, 511 F.3d at 161. (emphasis added). Relying on this characterization of the law, the Panel held: "Appellant's claim lacks merit because she failed to establish that a reduction in airtime responsibilities constituted a materially adverse action for the purpose of establishing a prima facie case of retaliation. Appellant offered nothing to the District Court or to this court establishing that the reduction in her airtime production ... could affect her **compensation, grade or opportunity for future advancement.**" *Id* (emphasis added).

The Panel then concluded that Ms. Wiley "failed to establish that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (quoting *Burlington Northern v. White*, 548 U.S. 53, 67 (2006)).

The D.C. Circuit's discussion of "tangible harm," in reliance on *Forkkio* – is inappropriate and contradictory to this Court's opinion in *Burlington Northern v. White*, and the "materially adverse" standard described therein.

Ms. Wiley's show and on-air time was reduced by twenty-five percent. It should go without saying that a broadcaster would think twice before filing a complaint of discrimination if doing so would result in his or her show or air-time being reduced by twenty-five percent. Moreover, Ms. Wiley explained that, because of time constraints, she was prohibited from treating her subjects with the depth that they require, and that she was forced to cut portions from her broadcast, resulting in a choppy, largely superficial program.

The Panel disregarded this impact, and more importantly neglected the "context counts" provisions in *Burlington Northern v. White*:

> [T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters ... A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by **excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement** might well deter a

> reasonable employee from complaining about discrimination.

Id. at 69. (emphasis added).

Instead of recognizing that *Burlington Northern v. White* overruled the "tangible harm" standard found in *Forkkio*, the *Wiley v. Glassman* decision, which reads *Burlington Northern v. White* and *Forkkio* to be consistent with each other, stands for the proposition that retaliation is not actionable unless it, both, is tangible (affecting a term and condition of employment) under *Forkkio* 306 F.3d 1131 and has the effect of "dissuading a reasonable worker from making or supporting charge of discrimination." *Burlington Northern v. White*, 548 U.S. at 67. *See Wiley v. Glassman 511 F.3d at 161.*

CONCLUSION

The D.C Circuit's opinion, in addition to being contrary to *Burlington Northern v. White*, is emblematic of the errors courts make when applying this Court's summary judgment precedent to employment discrimination cases. The heart of that problem is the courts' failure to consider the record as a whole, and specifically the evidence that supported the Petitioner, in violation of *Reeves*, 530 U.S. 133, 150 (2000)("under Rule 56, we have stated that the court must review the record 'taken as a whole.'"); *Anderson*, 477 U.S. at 255 ("the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding ..."); and *Matsushita*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find

for the non-moving party, there is no 'genuine issue for trial.'")

The D.C. Court of Appeals failed to acknowledge the direct evidence of retaliation and to adjust it analysis accordingly.

The D.C. Circuit also neglected to consider all of the record evidence put forward by the Petitioner, making it impossible for her to gain the advantage of the inferences that were owed to her. Additionally, the court disregarded evidence that the Respondent forwarded false justifications for its actions, which in turn permitted the court to ignore the genuine issues of material fact created by those false explanations. The court's failure to consider the entire record also caused it to miss the disputed facts with respect to the Petitioner's willingness to accept the Managing Editor rotation and the court's mistaken judgment that the Petitioner had waived her retaliatory harassment claim.

WHEREFORE, the Petitioner respectfully prays that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 06-5402
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERLA M. WILEY,
APPELLANT
v.
JAMES K. GLASSMAN, CHAIRMAN OF THE BROADCASTING BOARD OF GOVERNORS,
APPELLEE

November 16, 2007, Argued

December 14, 2007, Decided

Appeal from the United States District Court for the District of Columbia. (No. 99cv00975).

COUNSEL: Leslie D. Alderman, III argued the cause and filed the briefs for appellant.

Diane M. Sullivan, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were Jeffrey A. Taylor, U.S. Attorney, and Michael J. Ryan, Assistant U.S. Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

JUDGES: Before: BROWN and GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge.

OPINION

Opinion for the Court filed *Per Curiam*.

Per Curiam: Appellant Verla Wiley, an African-American woman, worked at the United States Information Agency ("USIA") from 1966 until her retirement in May 2005. In October 1999, USIA was abolished and certain sections reconstituted as the Broadcasting Board of Governors ("BBG"). *See* 22 U.S.C. §§ 6531-6553. (For the remainder of this opinion, appellee will be referred to as "BBG.")

During the time periods that are relevant to issues in this appeal, appellant worked as an International Radio Broadcaster in the English-to-Africa Branch of the Africa Division at Voice of America, formerly a division of USIA. In April 1999, Ms. Wiley and two other plaintiffs filed a lawsuit in District Court against USIA, alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq. The plaintiffs claimed that they had been discriminated against on the basis of their race and/or sex, subjected to a hostile work environment, and retaliated against for engaging in activities that were protected by Title VII. As of 2004, Ms. Wiley was the only remaining plaintiff in the litigation before the District Court.

The facts of this case have been described at length by the District Court, *see Kemi Southey-Cole v. Kenneth Y. Tomlinson*, Civ. A. No. 99-00975 (D.D.C. Oct. 2, 2006) (mem. op.); *Kemi Southey-Cole v. Kenneth Y. Tomlinson*, Civ. A. No. 99-00975 (D.D.C. May 6, 2005) (District Court judge's order adopting magistrate judge's report and recommendation in full); *Kemi Southey-Cole v. Marc B. Nathanson*, Civ. A. No. 99-00975 (D.D.C. May 26, 2004) (magistrate judge's report and recommendation), so appellant's allegations need not be recounted in detail here. On May 6, 2005, the

District Court granted appellee's motion to strike Ms. Wiley's retaliatory harassment claim, as well as her claim of retaliation based on a reduction in the amount of airtime that she was responsible for producing. Striking appellant's claims effectively dismissed them, and we treat the District Court's decision with respect to these two claims as if it had granted a motion pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court also granted appellee's motion for summary judgment on all but one of appellant's remaining claims. Subsequently, on October 2, 2006, the District Court granted summary judgment to appellee on Ms. Wiley's remaining claim that she suffered illegal retaliation when BBG forced her to use annual leave for the time that she took to attend depositions related to this lawsuit.

In this appeal, appellant claims that

1. she suffered discrimination and retaliation when appellee failed to promote her to a GS-13 pay grade;
2. she suffered discrimination and retaliation when appellee refused to allow her to participate in the managing editor rotation;
3. she suffered retaliation when appellee retroactively charged her annual leave for the time that she took to attend depositions related to this lawsuit;
4. the District Court erred in granting appellee's motion to strike her retaliatory harassment claim; and
5. the District Court erred in granting appellee's motion to strike her retaliation claim stemming from the reduction in the

number of minutes of airtime that she was assigned to produce.

We affirm the District Court's grant of summary judgment to appellee on appellant's first three claims. We reverse the District Court's decision to strike appellant's last two claims, but grant summary judgment to appellee on both.

Standard of Review and Legal Standard for Title VII Claims

We review the District Court's grant of summary judgment *de novo*. *Mastro v. Potomac Elec. Power Co.*, 371 U.S. App. D.C. 68, 447 F.3d 843, 849 (D.C. Cir. 2006). Summary judgment is appropriate only if there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R.CIV.P.56(c). "The inquiry performed is the threshold inquiry of determining whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether there are genuine factual issues in dispute, we must draw all reasonable inferences in favor of the nonmoving party. *Id.* at 255. Insofar as we are treating the District Court's decisions to strike two of appellant's claims as dismissals under Rule 12(b)(6), "[o]ur standard of review under Federal Rules 12(b)(6) and 56 is the same: *de novo*." *Wilson v. Pena*, 316 U.S. App. D.C. 352, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996).

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Title VII discrimination claims are assessed pursuant to a simple three-step framework:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [action in question]." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802). To establish a prima facie case of discrimination, a claimant must show that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999). To establish a prima facie case of retaliation, a claimant must show that (1) she engaged in a statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal connection existed between the two. *Id.*; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2414-15, 165 L. Ed. 2d 345 (2006) (finding that Title VII's anti-

retaliation provision prohibits all materially adverse actions, not merely those harms that are specifically employment-related). In either situation, as the Supreme Court has made clear, "[t]he burden of establishing a prima facie case . . . is not onerous." *Burdine*, 450 U.S. at 253.

Indeed, just two years after *Burdine* was decided, the Court emphasized, in strikingly clear terms, that

> [t]he prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (internal citation and quotation marks omitted). In this case, the District Court had before it hundreds of pages of documents, testimony from various witnesses that was provided during the investigation of appellant's claims by BBG's Office of Civil Rights, and depositions taken after the lawsuit was filed. So there is no doubt here that appellee aimed to "articulate[] legitimate reasons for [the allegedly discriminatory or retaliatory actions] and proffered evidence in support of those reasons." *George v. Leavitt*, 366 U.S. App. D.C. 11, 407 F.3d 405, 411 (D.C. Cir. 2005). Given this record, we "need not address the

Government's contentions that [appellant] failed to make out a prima facie case." *Id.* Rather, following the Court's direction in *Aikens*, we will "proceed to the ultimate question of discrimination *vel non*." *Id.* (internal quotation marks omitted).

First Claim: Failure to Promote to GS-13

Appellant claims that her failure to obtain a promotion to the GS-13 level in 1997 and 1998 was the result of discrimination based on her race and sex or retaliation for her complaints to the BBG's Office of Civil Rights. The District Court held, in part, that appellant failed to establish a prima facie case of discrimination, because she could not prove "that anyone similarly situated was promoted when she was not." *Kemi Southey-Cole v. Marc B. Nathanson*, Civ. A. No. 99-00975 at 22 (D.D.C. May 26, 2004). The District Court applied an erroneous legal standard in reaching this conclusion. Although appellant certainly could have offered evidence of "similarly situated" employees in support of her claim, she was not *required* to offer such evidence in order to make out a prima facie case. *See Mastro*, 447 F.3d at 850-51; *Stella v. Mineta*, 350 U.S. App. D.C. 300, 284 F.3d 135, 145-46 (D.C. Cir. 2002).

Nevertheless, because we review the District Court's decision *de novo*, we conduct an independent evaluation of the record to determine whether appellant offered sufficient evidence to prove discrimination *vel non*. We hold that she did not. The undisputed evidence in the record establishes that there were only two ways for an employee in appellant's situation to obtain a noncompetitive promotion (other than career ladder promotions) at BBG: (1) an impact promotion, which is

based on "exceptional ability exhibited by the employee"; and (2) an accretion of duty promotion, pursuant to which a position is reclassified at a higher grade "because the duties and responsibilities of the position have increased over a period of time." Supplemental Declaration of Donna S. Grace, Joint Appendix ("J.A.") 236. Only the second -- "accretion of duty promotion" -- is at issue in this case.

Appellant offered virtually nothing to establish what her original duties as a GS-12 International Radio Broadcaster had been, what duties she was performing when she was denied a promotion, and what responsibilities the GS-13 position commonly entailed. Moreover, when BBG attempted to arrange a desk audit, in which a job classification specialist would have evaluated Ms. Wiley's work responsibilities, Ms. Wiley refused. Deposition of Verla M. Wiley (5/24/01), J.A. 842-43; Note to the Record of Janet Davis (1/26/98), J.A. 1371. Rather, when asked why she believed that she deserved a GS-13 promotion, appellant testified, "I thought I was doing a great job . . . . I just felt I deserved a 13." Deposition of Verla M. Wiley (5/24/01), J.A. 846. Although appellant attempts to compare herself to Joseph DeCapua, another English-to-Africa employee who was promoted to a GS-13 International Radio Broadcaster position, her argument falls far short. There is clear evidence in the record to indicate that DeCapua's job responsibilities had grown over time and that he had significantly greater responsibilities than appellant did at the time of his promotion. *See, e.g.*, Declaration of Fredrica B. Depew (11/9/01), J.A. 213; Deposition of Barry Maughan (4/18/01), J.A. 1077-78; Deposition of Joseph Anthony DeCapua (3/5/01), J.A. 916-18.

In sum, appellant failed to establish that she was denied a promotion as a result of illegal discrimination or retaliation. Appellant never proved that the duties and responsibilities of her job had increased so as to warrant an accretion of duty promotion. Without such evidence, appellant cannot prove that the failed promotion was a pretext for either discrimination or retaliation.

Second Claim: Nonparticipation in the Managing Editor Rotation

During the time when Barry Maughan was Chief of the English-to-Africa Division, he rotated the individuals who were assigned to serve in the managing editor position. Appellant claims she was denied the opportunity to participate in this rotation because of illegal discrimination and retaliation.

The District Court erroneously found that appellant suffered no adverse employment action as a result of her exclusion from the managing editor rotation and, therefore, failed to make out a prima facie case on this claim. An employment action may be sufficient to support a claim of discrimination if it results in "materially adverse consequences affecting . . . future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Forkkio v. Powell*, 353 U.S. App. D.C. 301, 306 F.3d 1127, 1131 (D.C. Cir. 2002). Exclusion from the managing editor rotation surely qualifies as an adverse employment action.

Maughan, who was appellant's manager, testified that he did not support appellant's request for a GS-13

promotion in part because she did not have any "supervisory duties" in her current job. Deposition of Barry Maughan (4/18/01), J.A. 1088-89. And Maughan acknowledged that the required "supervisory duties" included "be[ing] able to carry out the functions of a managing editor and senior editor." *Id.*, J.A. 1073. He also testified that, "outside of being a senior editor, [managing editor is] the most important function in the shop." *Id.* Given this testimony from appellant's manager, it can hardly be said that Ms. Wiley suffered no adverse employment action when she was barred from participating in the managing editor rotation.

Even though appellant may have suffered an adverse employment action, this, without more, is not proof of illegal discrimination or retaliation. On the record here, it is obvious and undisputed that the responsibilities of managing editor were time-consuming. *See* Declaration of Barry H. Maughan, J.A. 499-502. It is equally clear that, during the time period in question, appellant, who was serving as Vice President of the American Federation of Government Employees, Local 1812, was very busy with union work. *See* Deposition of Verla Wiley (6/6/01), J.A. 879-80; Deposition of Verla M. Wiley (5/24/01), J.A. 817-20; Deposition of Barry Maughan (4/18/01), J.A. 1079, 1087-89. Appellant herself stated that she served in a managing editor-type position at BBG in the 1980s for a show called "Nightline Africa," but had to stop after she became Vice President of Local 1812 in 1990. Deposition of Verla M. Wiley (5/24/01), J.A. 817-18. She responded in the affirmative when asked, "And because you had more responsibilities as vice president of the union, you couldn't do that and be managing editor, too?" *Id.* at 818. Appellant continued to hold the position of Vice

President of Local 1812 in 1996 and 1997, when she sought to be included in the managing editor rotation.

Appellant does not claim that she was illegally discriminated against on the basis of her union activities, nor would such a claim be cognizable under Title VII. What is noteworthy here is that appellant does not really contest appellee's contention that she was too busy with her union duties to serve as managing editor. We therefore hold that appellee offered a legitimate, nondiscriminatory reason for appellant's nonparticipation in the managing editor rotation and appellant failed to prove that this reason was merely a pretext for discrimination or retaliation proscribed by Title VII.

Third Claim: Retroactive Application of Annual Leave Policy

Appellant contends that she suffered unlawful retaliation when she was retroactively charged annual leave for attending witness depositions related to this lawsuit. In February 2001, Ms. Wiley approached her then-supervisor, Rebecca McMenamin, about taking "administrative leave" -- paid leave that is not charged against an employee's allotted annual leave -- to attend witness depositions. McMenamin responded via email, indicating that administrative leave was unavailable in such circumstances. Email from Rebecca McMenamin to Verla Wiley *et al.* (2/14/01), J.A. 2077. That same day, appellant discussed the administrative leave issue with William Ohlhausen, Deputy General Counsel for BBG. Ohlhausen sent an email the following day indicating that he was unable to reach a conclusion as to whether administrative leave was authorized in Wiley's

circumstances, and needed to research the issue further. Email from William Ohlhausen to Verla Wiley *et al.* (2/15/01), J.A. 61. Appellant continued attending depositions.

On October 5, 2001, guidelines applicable to all Voice of America employees were issued, delineating when employees could use administrative leave in connection with Title VII matters. Memorandum, J.A. 2113-14. These guidelines prohibited employees from taking official time to attend depositions other than their own. After this policy issued, McMenamin emailed appellant to inform her that she would be charged annual leave for the depositions she had previously attended; McMenamin's email noted that "[t]his policy indicates there is no change from the guidance I first sent you on February 14th, 2001." Email from Rebecca McMenamin to Verla Wiley *et al.* (10/9/01), J.A. 2125. Appellant was subsequently charged 56 hours of annual leave for time she spent attending depositions other than her own.

Appellant claims that BBG's decision to retroactively charge her annual leave was unlawful retaliation. As the District Court found, however, appellant cannot overcome the legitimate, nondiscriminatory reason for BBG's decision to charge her annual leave: No statute, regulation, or policy authorized administrative leave for an employee in appellant's circumstances. In fact, during the time period at issue here, neither BBG's internal Manual of Operations nor the Negotiated Labor Management Agreement between Local 1812 and BBG authorized administrative leave for employees in appellant's situation. BBG Manual of Operations, J.A. 1765-68; Negotiated Labor Management Agreement, J.A. 1764. Appellant can

hardly claim retaliation when she has not shown that she was entitled to paid leave. The October 2001 guidelines may have clarified the situation, but they did not cause appellant to lose anything to which she was entitled before the guidelines were issued. Furthermore, McMenamin's February 14, 2001 email to Ms. Wiley provided appellant with more than adequate notice that an attempt to take such leave would likely be unsuccessful. Appellant's decision to continue attending depositions after receiving Ohlhausen's email was, in the words of the District Court, "a calculated risk." *Kemi Southey-Cole v. Kenneth Y. Tomlinson*, Civ. A. No. 99-00975 at 16 (D.D.C. Oct. 2, 2006). "[N]o reasonable jury could infer retaliation from the agency's decision to comply with existing law and agency agreements." *Id.* at 22.

Fourth Claim: Retaliatory Harassment

The District Court granted appellee's motion to strike appellant's claim for retaliatory harassment, primarily on the grounds that it was raised for the first time in appellant's opposition to appellee's motion for summary judgment. This was error. The factual basis for appellant's "new" claim was substantially similar to the hostile work environment claim that appellant had alleged in her original complaint, and BBG did not demonstrate that allowing appellant's claim would cause undue prejudice. Therefore, this claim should not have been struck.

> The real issue . . . is not whether legal theories may be pleaded but whether the original theory may be discarded or augmented and recovery had on some other theory. The federal rules, and

> the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.

5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1219 at 281-83 (3d ed. 2004) (footnote omitted); *see also Alley v. Resolution Trust Corp.*, 299 U.S. App. D.C. 363, 984 F.2d 1201, 1207-08 (D.C. Cir. 1993) (allowing plaintiffs to add an ERISA claim after motions for summary judgment had been filed because there was no prejudice to the defendant).

The District Court granted summary judgment to appellee on appellant's hostile work environment claim, and that judgment has not been appealed. In addition to granting the motion to strike appellant's retaliatory harassment claim, the District Court held, in the alternative, that insofar as appellant's retaliatory harassment claim was merely a variation of her prior hostile environment claim, it lacked merit for the same reasons that the hostile environment claim had failed. During oral argument, appellant's counsel conceded that Ms. Wiley could not prevail on her retaliatory harassment claim unless she could establish that the alleged harassment resulted in a hostile environment. *See Hussain v. Nicholson*, 369 U.S. App. D.C. 247, 435 F.3d 359, 366 (D.C. Cir. 2006) (noting that "[i]n this circuit, a hostile work environment can amount to retaliation under Title VII"). Because there is no claim

here that the District Court erred in granting summary judgment on appellant's hostile environment claim, appellant's retaliatory harassment claim necessarily fails as well. We therefore grant summary judgment for appellee on this claim.

Fifth Claim: Reduced Airtime

The District Court granted appellee's motion to strike appellant's final claim, *i.e.*, that she suffered retaliation when McMenamin reduced her airtime production from 17 minutes to 13 minutes. The District Court struck this claim on the grounds that appellant failed to exhaust her administrative remedies. Appellant filed an informal complaint of discrimination, withdrew it on August 27, 2002, and never filed a formal complaint specifically listing her airtime claim.

The District Court erred in striking appellant's claim, because the reduced airtime allegation "could have reasonably been expected to grow out of [appellant's] earlier complaint." *Weber v. Battista*, 377 U.S. App. D.C. 347, 494 F.3d 179, 184 (D.C. Cir. 2007) (internal quotation marks omitted). Hattie Baldwin, the Director of the USIA's Office of Civil Rights, wrote to appellant confirming that her complaints of discrimination and retaliation had been received, acknowledged, and consolidated. Letter from Hattie P. Baldwin to Verla M. Wiley (5/14/98), J.A. 407-08. The complaints that were accepted for processing included the denial of "training for supervisory/managerial roles within the Branch," the denial of Wiley's "input" on "programming and policy with regard to office procedures and broadcasts," and the denial of "career advancement and promotional opportunities." *Id.* at 408. The record thus

makes it clear that the airtime claim was "like or related" to the claims of discrimination and retaliation raised in appellant's original complaint. *Weber*, 494 F.3d at 184. "Therefore, we conclude [appellant] gave [BBG] an opportunity to resolve her claim administratively before she filed her complaint in district court." *Id.* The claim was properly before the District Court and should not have been struck.

Although it cannot be said that appellant failed to exhaust her administrative remedies, we nonetheless grant judgment to appellee. The District Court effectively dismissed appellant's claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b) states that, if, on a motion to dismiss, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(b).[1] In this case, the District Court considered "matters outside the pleading" in granting the agency's motion to strike, and both parties had a "reasonable opportunity to present all material made pertinent" to the motion. The District Court, however, did not convert what was ostensibly a 12(b)(6) motion to one for summary judgment. Nonetheless, in these circumstances, this court is free to characterize the District Court's Rule 12(b)(6) dismissal as a grant of summary judgment under Rule 56 and affirm, so long as we are assured that both sides had a reasonable opportunity to present evidence and there are no genuine issues of material fact. *See, e.g., Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 371 U.S. App. D.C. 422, 452 F.3d 798, 805 (D.C.

Cir. 2006). Finding no merit in appellant's claim, we will grant summary judgment to appellee.

Appellant's claim lacks merit because she failed to establish that a reduction in airtime responsibilities constituted a materially adverse action for the purpose of establishing a prima facie case of retaliation. As noted above, "an employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Forkkio*, 306 F.3d at 1131. Appellant offered nothing to the District Court or to this court establishing that the reduction in her airtime production -- from 17 minutes to 13 minutes -- could affect her compensation, grade, or opportunity for future advancement.

Appellant has also failed to establish that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington, 126 S. Ct. at 2415 (internal quotation marks omitted). Without such proof, there can be no finding of unlawful retaliation. Actionable retaliation claims are limited to those where an employer causes " *material* adversity," not "trivial harms." *Id.* Appellant has failed to show that the disputed reduction in airtime production was anything other than a trivial harm, if that.

Conclusion

For the foregoing reasons, the District Court's grant of summary judgment to appellee with respect to appellant's first three claims is affirmed. The District Court's decision to strike appellant's last two claims is reversed, and summary judgment is granted to appellee on those claims as well.

Footnote

1Rule 12(d), which went into effect on December 1, 2007 and is titled "Result of Presenting Matters Outside the Pleadings," states that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."

10/2/2006
Civ. No. 99-975 (TFH)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

KEMI SOUTHEY-COLE, et al.
Plaintiffs,
v.
KENNETH Y. TOMLINSON, Chairman, Broadcasting Board of Governors,
Defendant.

MEMORANDUM OPINION

Pending before the Court is defendant Kenneth Y. Tomlinson's Motion for Summary Judgment regarding plaintiff Vera Wiley's claim that the Broadcasting Board of Governors (the "agency") retaliated against her in violation of Title VII of the Civil Rights Act of 1964 by charging her annual leave for time she spent attending witness depositions while preparing her employment discrimination case. The defendant argues that judgment in the agency's favor is warranted on the grounds that (1) the plaintiff is unable to establish a prima facie case of retaliation because she cannot show that she was subjected to a material injury or harm that would dissuade a reasonable employee from making a charge of retaliation, and (2) even if the plaintiff could establish a prima facie case of retaliation, the agency articulated a non-retaliatory reason for its action that the plaintiff failed to show was pretext. The Court holds that, because the agency complied with existing law and agency agreements when it charged the plaintiff annual leave to attend witness depositions, the plaintiff was not subjected to a material injury or harm

and, as a result, is unable to establish all the required elements of a retaliation claim.

Likewise, the plaintiff is unable to show that the agency's compliance with existing law and agreements was mere pretext for retaliation. Accordingly, the Court will grant the defendant's motion.

BACKGROUND

The undisputed facts reveal that the plaintiff is an African-American female who was employed as an International Radio Broadcaster for the English to Africa Branch of Voice of America, which is one of several international broadcasters that comprise the International Broadcasting Bureau, which in turn is part of the Broadcasting Board of Governors. Statement of Material Facts as to Which There is No Genuine Issue Par. 1, 3 [hereinafter "Undisputed Facts Par. _"];[1] Wiley Dep. 5:21-23. The Broadcasting Board of Governors is an independent federal agency responsible for all non-military international broadcasting sponsored by the United States government. About the BBG, http://www.bbg.gov/bbg aboutus.cfm. At the time of the events at issue, the plaintiff had an employment discrimination case pending against the agency in this court.

During all times relevant here, the agency was subject to compliance with a Negotiated Labor Management Agreement between the United States Information Agency and the American Federation of Government Employees, Local 1812 (AFL-CIO). The plaintiff was the Vice President for Voice of America union members and acted as a union representative for employees

engaged in proceedings at the Equal Employment Opportunity Commission ("EEOC"). Wiley Dep. 7:10-18:16. Article 24 of the Negotiated Labor Management Agreement contained provisions relating to leave. Pl.'s Mem. In Opp'n to Def.'s Mot. for Summ. J. Ex. 26B, Negotiated Labor Management Agreement Art. 24 [hereinafter "Pl.'s Opp'n Br. "]. Section 8 of that Article addressed "court leave' and stated that such leave was available when an employee was summoned to appear as a witness or juror on behalf of the federal government. Id. § 8. That section expressly stated, however, that "[c] ourt leave is not available when the service is strictly on behalf of a private party - it must be on behalf of a government." Id. Furthermore, Section 8 mandated that an employee submit a copy of the summons in advance to his or her supervisor. Id. In addition, Section 10 of Article 24 authorized excused absences, also referred to as administrative leave, but directed that an excused absence "must be approved by the supervisor" and cited blood donation, voting, and unavoidable absences not to exceed one hour as examples of "common excused absences." Id. § 10.

The agency also had in place a Manual of Operations and Administration ("MOA") that contained similar provisions relating to "court leave,"[2] which was available to employees summoned to appear in a judicial proceeding on behalf of the federal government, when testifying in an official capacity, when appearing as a witness in a judicial proceeding involving the federal government as a party, when appearing as a juror, or when appearing to qualify for jury service. Pl.'s Opp'n Br. Ex. 26B, MOA § 671. Similar to the Negotiated Labor Management Agreement, the MOA also required employees to submit a copy of the

summons before court leave may be granted. Id. § 675. The agency also was subject to compliance with Title V of the United States Code, Section 6322 of which governs leave for jury or witness service. 5 U.S.C. § 6322 (2001). That statute permits employees to take leave without loss of pay or annual leave when summoned to serve as a juror or as a witness in a judicial proceeding for which the federal government is a party, among other authorized occasions not relevant here. Id.

In February 2001, the plaintiff approached her supervisor, Rebecca McMenamin, and stated that it was her understanding that she was permitted to take administrative leave to attend witness depositions in her employment discrimination case. Undisputed Facts Par. 7; McMenamin Dep. 22:13-23:5. McMenamin told the plaintiff that she would look into the matter. Undisputed Facts Par. 7; McMenamin Dep. 22:13-23:5. On February 14, 2001, McMenamin sent an e-mail to Donna Grace, a Labor Relation Specialist in the Office of Personnel, seeking guidance about whether the plaintiff was authorized to take administrative leave to attend witness depositions. Pl.'s Opp'n Br. 4 Par. 2; Undisputed Facts Par. 7; McMenamin Dep. 23:3-5; Grace Dep. 15:5-9. Grace responded to McMenamin's inquiry that same day and advised her that:

> There is such a thing as "court leave," which is a form of admin leave and would not be charged against an employee. However, it cannot be used to work on one's own court case. Court leave is for when you are required to serve jury duty or when you are summoned to testify for an Agency in an official capacity. If Verla ... [is] working on

> [her] own case, it's personal business and must be charged as annual leave, scheduled in advance, and approved by the supervisor for a time when it does not interfere with work. It most definitely is not court leave or any other form of administrative leave.

Pl.'s Opp'n Br. Ex. 7 (E-mail from Grace to McMenamin of 2/14/01).[3] Twenty minutes after receiving Grace's response, McMenamin sent the following e-mail to the plaintiff and two other individuals explaining that administrative leave was not authorized to attend witness depositions:

> I understand there is some confusion about what qualifies as administrative leave, regarding time needed to pursue legal business. As explained to me by the Personnel Office today:
>
> There is such a thing as "court leave," which is a form of admin leave and would not be charged against an employee. However, it cannot be used to work on one's own court case. Court leave is for when you are required to serve jury duty or when you are summoned to testify for an Agency in an official capacity.
>
> If you are working on your own court case, then it is viewed as personal business and must be charged as annual leave, scheduled in advance, and does not interfere with work [sic].

Id. at Ex. 8 (E-mail from McMenamin to Abedje, Southey-Cole and Wiley of 2/14/01). The plaintiff acknowledged in an affidavit that "[m]y supervisor,

after consulting with Labor Relations Specialist Donna Grace, informed me on February 14 that [administrative] leave was not authorized." Def.'s Br. Ex. 1(A2).

That same day, the plaintiff attended a witness deposition at which Deputy General Counsel William Ohlhausen was present. Pl.'s Opp'n Br. 4 Par. 3; Wiley Dep. 26:15; Ohlhausen Dep. 7:4-15; Undisputed Facts Par. 11. The plaintiff asked Ohlhausen whether she was allowed to take administrative leave to attend witness depositions in her case. Pl's Opp'n Br. 4 Par. 3; Wiley Dep. 27:3-17; Undisputed Facts Par. 15. The parties dispute what Ohlhausen told the plaintiff. During a deposition, Ohlhausen testified that he told the plaintiff he was uncertain about whether administrative leave was authorized for the purpose of attending witness depositions and would research the issue. Ohlhausen Dep. 7:21-8:2; Undisputed Facts Par. 12. The plaintiff claims that Ohlhausen told her "she could take official time to attend the depositions." Pl.'s Opp'n Br. 4 Par. 3; Wiley Dep. 28:21-22. Regardless of what Ohlhausen told the plaintiff at the deposition, it is undisputed that the very next day he made clear his uncertainty about whether administrative leave was authorized to attend witness depositions when he sent the plaintiff and several other agency officials an e-mail stating:

> Ms. Wiley asked me about the taking of official leave to take part in EEOC proceedings, specifically the attendance at depositions. I did a little research yesterday and I am forwarding to all of you the EEOC's regulation on this subject.... The regulation ... does not specifically address the issue of complainants attending

> depositions and document productions. I am sending this email to Delia Johnson to see if her office has issued any policy statements on this. After I have an opportunity to discuss this further with Delia and do more research on the question, I will get back to all of you with a more definitive opinion.

Pl.'s Opp'n Br. 5 Par. 4 ("Mr. Ohlhausen followed up on Ms. Wiley's query regarding the use of official time for attending depositions with an e-mail dated February 15, 2001 wherein he indicated that he needed to do more research and that he would provide additional guidance after doing so."), Ex. 11 (E-mail from Ohlhausen to Wiley, Southey-Cole, Johnson, Dillard and McMenamin); Wiley Dep. 36:16-21 (indicating that she notified McMenamin about Ohlhausen's uncertainty regarding the administrative leave policy); Undisputed Facts Par. 13. Indeed, during her own deposition the plaintiff acknowledged that Ohlhausen was uncertain about the issue and said that "he'll get back to us on this." Wiley Dep. 36:22-23.

After receiving both McMenamin's and Ohlhausen's e-mails, the plaintiff had another conversation with McMenamin during which she expressed her disagreement with McMenamin's position that she was not entitled to take administrative leave to attend witness depositions. Wiley Dep. 36:15-21; Undisputed Facts Par. 14; McMenamin Dep. 25:17-21. The plaintiff referred McMenamin to Ohlhausen's e-mail and noted that Ohlhausen planned to offer his analysis of the issue at a later date. Wiley Dep. 36:22-23 (stating that she let McMenamin "know that he is saying he'll get back to us on this"). According to the plaintiff, McMenamin agreed

making a final decision about whether the plaintiff was entitled to take administrative leave to attend witness depositions. Wiley Dep. 36:23-24. The plaintiff engaged in no further discussions with her supervisor about whether administrative leave was authorized for witness depositions, which she continued to attend. Wiley Dep. 38:8-11; Pl.'s Opp'n Br. 6 Par. 7. Instead, the plaintiff simply waited for Ohlhausen's decision. Wiley Dep. 3 8:6-7.

At some point before October 5, 2001, however, the plaintiff met with Jack Welch, who at that time was the Director of Human Resources. Wiley Dep. 39:6-40:6; Def.'s Mot. for Summ. J. Ex. 5 (Welch Decl. Par. 1). According to the plaintiff, when she asked Welch about the leave issue he told her that he was "sure" she would be charged annual leave for the time she spent attending witness depositions. Wiley Dep. 39:9-11.

On October 5, 2001, the agency's Office of Civil Rights forwarded a memorandum addressed to all employees that was titled "Guidelines for Complainants and Managers Regarding Use of Official Time to Participate in Proceedings Before the OCR, the EEOC or the Federal Courts." Pl.'s Opp'n Br. Ex. 1. The memorandum's stated purpose was to "provide guidance to employees concerning existing agency policy regarding the use of official time (also referred to as `official leave' or `administrative leave') in proceedings alleging violations of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, or the Rehabilitation Act." Id. The memorandum distinguished between cases pending before the agency's Office of Civil Rights or the EEOC

With regard to cases pending before federal district courts, the memorandum stated that:

> An employee who is a plaintiff in the lawsuit shall be granted official leave when being deposed by the agency. If there are multiple plaintiffs in the lawsuit, an employee/plaintiff is entitled to official leave to attend only his or her own deposition, but not those of the other plaintiffs or of non-party witnesses.

Id. Although the memorandum was addressed from the Office of Civil Rights, it is uncontested that it was drafted by Ohlhausen. Undisputed Facts Par. 17.

Four days after the memorandum was circulated, McMenamin sent an e-mail to the plaintiff notifying the plaintiff that she would be charged annual leave for the time she spent attending witness depositions. Pl.'s Opp'n Br. Ex. 16. McMenamin's e-mail stated:

> The Office of Civil Rights has issued a statement clarifying agency policy regarding the use of leave in retaliation to legal matters. This policy indicates there is no change from the guidance I first sent you on February 14, 2001. In brief, it reiterates that, if you are working on your own court case, it is personal business and must be charged as annual leave, scheduled in advance, and approved by the supervisor for a time when it does not interfere with work. The only exception to the use of annual leave is when an employee is being deposed. In that case, the employee would be given administrative leave to

attend the deposition

> We now must correct your time and attendance record to reflect the times you were out of the office. I will drop off for you a list detailing the days that you attended depositions. Please review the days/times listed to ensure they are correct. I also will pass a copy of the list on to Nikki so that she may make the proper adjustments.

Id.

In the ensuing days, several communications were exchanged between agency officials relating to whether Delia Johnson, the Director of the Office of Civil Rights, thought that the memorandum circulated on October 5, 2001, constituted a new policy. Pl's Opp'n Br. 9 at Pars. 1719, 25, 33, Exs. 3-5,11,17, 20-21. Johnson stated during a November 8, 2005, deposition that she considered the memorandum to be a new policy because, at that time, her office did not have a written internal policy dealing with employment discrimination cases pending in a federal district court.[4] Pl.'s Opp'n Br. Ex. 15 (Johnson Dep. 13:3-12 (11/8/05)). Johnson attributed the lack of an internal written policy to the fact that the Office of Civil Rights "[was] responsible for cases doing the administrative procedures and not once they got to the court level." Id. During a subsequent deposition on January 25, 2006, Johnson further confirmed that she had no "jurisdiction" over employment discrimination cases pending in a federal district court; therefore, "[a]ny decisions made at that time are made through either the Office of General Counsel, the HR office, and not with - not through my

office." Johnson Dep. 34: 9-14 (1/25/06). An October 12, 2001, e-mail from Johnson to General Counsel Carol Booker and Office of Personnel Director Jack Welch indicates that she was concerned that "management and/or [the General Counsel] should have given notice to the complainants that the leave usage was not permissible." Pl.'s Opp'n Br. Ex. 4. Later, however, after receiving an e-mail from Booker explaining the chronology of events and the fact that McMenamin told the plaintiff on February 14, 2001, that she could not take administrative leave to attend witness depositions, Johnson acknowledged that if McMenamin "gave appropriate notice regarding the leave policy, she should proceed to handle the matter as advised by [the Office of General Counsel]." Pl.'s Opp'n Br. Ex. 17. Johnson nevertheless expressed her concern that the agency should have been charging the plaintiff leave beginning in February, when the plaintiff's supervisor first notified the plaintiff that administrative leave was not authorized to attend witness depositions. Id. After further explanation in an October 16, 2001, e-mail in which Booker stated that "[t]he affected employees are not losing anything they would otherwise have a right to, as it turns out that there is no Title VII exception to the policy in the MOA, which we would gladly have reported had we found one," Johnson responded "Great! I am happy that we can move on and [McMenamin] is able to proceed with the advice from your office." E-mail from Johnson to Booker with copies to West, Ohlhausen, Welch and McMenamin of 10/16/01.

On October 24, 2001, the plaintiff, acting pro se, filed a Notification of Additional Acts of Reprisal or Related Occurrences in which she first asserted that the agency was retaliating against her by charging her annual

leave for the time she spent attending witness depositions. That allegation subsequently was consolidated into her employment discrimination lawsuit pending before this Court, for which she has legal representation. On May 31, 2006, the defendant filed the Motion for Summary Judgment that is now at issue.

DISCUSSION

I. Summary Judgment Standard

"Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits filed pursuant to discovery show that, first, `there is no genuine issue as to any material fact' and, second, `the moving party is entitled to a judgment as a matter of law.'" Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting Rule 56(c) of the Federal Rules of Civil Procedure and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)). When determining whether a genuine issue of material fact exists, the Court must consider the evidence in the light most favorable to the nonmoving party without deciding its weight or credibility; however, the Court need not give credence to the nonmoving party's conclusory allegations that lack factual support in the record. Id.; District Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 878 (D.C. Cir.1999) ("In deciding whether there is a genuine issue of material fact, the court must assume the truth of all statements proffered by the non-movant except for conclusory allegations lacking any factual basis in the record."). Moreover, to defeat summary judgment, it is insufficient for the nonmoving party to point out

disputed facts that are immaterial or fail to raise genuine issues. Holcomb, 433 F.3d at 895. As the D.C. Circuit has explained:

> "The mere existence of some alleged factual dispute between the parties" will not defeat summary judgment; "the requirement is that there be no genuine issue of material fact." A fact is "material" if a dispute over it might affect the outcome of a suit under governing law; factual disputes that are "irrelevant or unnecessary" do not affect the summary judgment determination. An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and one on which that party will bear the burden of proof at trial."

Id. (internal citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no `genuine issue for trial."' Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986) (citation omitted).

II. Whether the Plaintiff Established a Prima Facie Case of Retaliation

The legal question in this case is whether the agency's decision to charge the plaintiff annual leave for time she spent attending witness depositions rises to the level of actionable retaliation. Both parties agree that a

retaliation claim is subject to the same burden-shifting standard as employment discrimination claims. Mem. of P. & A. In Supp. of Def.'s Mot. for Summ. J. 9 ("Evaluation of a Title VII retaliation claims follows the same burden-shifting template as a discrimination claim.") [hereinafter "Def.'s Br. "]; Pl.'s Opp'n Br. 15-16 ("Evaluation of Title VII retaliation claims follows the same burden-shifting template as discrimination claims."); see also Cones v. Shalala,199 F.3d 512, 520 (D.C. Cir. 2000) (acknowledging that the "burden-shifting mechanism" applies to a court's evaluation of a retaliation claim). Both parties therefore agree that the analysis of the issue must proceed according to the following scheme:

> (1) The plaintiff must first establish a prima facie case of retaliation.
> (2) If the plaintiff establishes a prima facie case of retaliation, then the burden of production shifts to the agency to proffer evidence of a legitimate, non-retaliatory reason for its actions.
> (3) If the agency articulates a legitimate, non-retaliatory reason for its actions, the burden of production shifts back to the plaintiff to proffer evidence that the agency's non-retaliatory reason for its actions is pretext.

Def.'s Br. 9; Pl.'s Opp'n Br. 16; Cones, 199 F.3d at 520. To make out a prima facie case of retaliation, the plaintiff must establish that she engaged in a statutorily protected activity, the employer took an adverse employment action, and a causal connection existed between the two. Forkkio v. Powell, 306 F.3d 1127,1131(D.C. Cir. 2002). The government concedes that the plaintiff was engaged in a statutorily protected

activity at the time she was charged annual leave for attending witness depositions. Def.'s Br. 9 ("Here, plaintiff was engaged in protected activity at the time of the alleged retaliatory action."). The government argues, however, that the plaintiff is unable to meet her burden of showing that the agency took an adverse employment action against her. Id. at 10.

The Supreme Court recently considered the contours of the legal standard to establish an adverse employment action in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. ,126 S.Ct. 2405 (2006). In Burlington, the Supreme Court considered (1) "whether Title VII's antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace" and (2) "how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope." Burlington, 126 S.Ct. at 2411. After first determining that "the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm," the Supreme Court went on to observe that "[t]he anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." Id. at 2414. The Supreme Court ultimately held that, to be an actionable injury or harm, the plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 2415 (internal quotation marks and citations omitted). The Supreme Court explained:

> We speak of material adversity because we

> believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VIPs remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.

Id. (citations omitted). The Supreme Court further stated that "the significance of any given act of retaliation will often depend upon the particular circumstances." Id. As the Supreme Court emphasized: "Context matters." Id.

Accordingly, the question is whether the plaintiff can meet her burden of showing that the agency took a materially adverse employment action against her, as measured by whether the agency's decision to charge her annual leave for time she spent attending witness depositions might have dissuaded a reasonable employee from making or supporting a charge of discrimination. Even when viewed in a light most favorable to the plaintiff, who is the nonmoving party, the Court is unpersuaded that the evidence shows the plaintiff was subjected to a materially adverse action.

The crux of the plaintiff's retaliation claim is that, after Deputy General Counsel William Ohlhausen told the plaintiff that she could take administrative leave, the agency engaged in an effort to develop a new policy over a period of several months that retroactively stripped the plaintiff of the right to use such leave notwithstanding the fact that agency officials knew the plaintiff was taking administrative leave to attend witness depositions and failed to notify her that she would be charged annual leave for that time. Pl.'s Opp'n Br. l. The problem with the plaintiff's argument is that its viability depends on the fact finder ignoring the undisputed evidence that the plaintiff's supervisor told her on February 14, 2001, that "[i]f you are working on your own court case, then it is viewed as personal business and must be charged as annual leave, scheduled in advance, and approved by the supervisor for a time when it does not interfere with work." Pl.'s Opp'n Br. Ex. 8. Thus, on February 14, 2001, the plaintiff's request to take administrative leave was denied by her supervisor. The fact that the plaintiff disputed that determination or was not apprised of the actual legal basis for it does not eviscerate its effect of putting her on notice that she would be charged annual leave for time spent attending witness depositions.

Moreover, it is immaterial whether, that same day, Ohlhausen in fact told the plaintiff that she could take administrative leave. Ohlhausen was not the plaintiff's supervisor and it is undisputed that the very next day he sent the plaintiff an e-mail making it clear that he was uncertain whether administrative leave was authorized and planned to research the issue further. Id. at Ex. 11(e-mail from Ohlhausen to Wiley and Southey-Cole with copies to Johnson, Dillard and

McMenamin of 2/15/01); Wiley Dep. 36:15-24. As a result, at that point, the plaintiff was notified that whatever Ohlhausen told her the previous day might have been in error and should not be relied upon.[5]

After receiving Ohlhausen's e-mail stating that he would research whether the plaintiff was entitled to take administrative leave to attend witness depositions, the plaintiff contends that she discussed the matter further with McMenamin and McMenamin "agreed that she would wait until [Ohlhausen] got back for the final decision on the leave issue." Wiley Dep. 36:23-24. There is no evidence that McMenamin's decision to wait several months before charging the plaintiff annual leave for the time she spent attending depositions was anything other than an accommodation to the plaintiff in response to the plaintiff's contention that the decision to deny administrative leave was incorrect and any final decision should await Ohlhausen's analysis. Pl.'s Opp'n Br. Ex. 14 (McMenamin declaring that she "did not want to appear to be harassing anyone about a matter over which [she] was in some doubt" so she "agreed to wait until the matter was checked out further before making a final decision on leave"); Wiley Dep. 36:15-24. The plaintiff took a calculated risk when she continued to attend witness depositions in the hopes that Ohlhausen's legal analysis would confirm her assertion that McMenamin's decision denying administrative leave was incorrect.

Significantly, the plaintiff has never disputed that, at the time she first requested administrative leave from her supervisor on February 14, 2001, no such leave was authorized by the applicable law, rules or agency agreements, namely 5 U.S.C. § 6322, the Negotiated

Labor Management Agreement, or the MOA. It is notable that the Negotiated Labor Management Agreement, with which the plaintiff likely was familiar as a union representative, explicitly prohibited the use of court leave "when the service is strictly on behalf of a private party" and not on behalf of the government, as was the case when the plaintiff attended witness depositions in her pending employment discrimination case. Negotiated Labor Management Agreement, Art. 24 § 8. That Agreement also made clear that administrative leave "must be approved by the supervisor." Id. at Art. 24 § 10.

Similarly, the MOA permitted court leave only for certain specified activities that did not include attending witness depositions on behalf of a private party. Consequently, the plaintiff's supervisor acted entirely consistent with the Negotiated Labor Agreement and MOA when she followed the Office of Personnel's guidance and advised the plaintiff that she was not entitled to administrative leave so any time spent attending witness depositions "must be charged as annual leave, scheduled in advance...." Pl.'s Opp'n Br. Ex. 8 (E-mail from McMenamin to Abedje, Southey-Cole and Wiley of 2/14/01).

From this vantage point, which is one the plaintiff entirely overlooks in favor of looking backward from the date the October memorandum was circulated, the facts of this case appear to be similar to those in Moore v. Summers, 113 F. Supp.2d 5, 28-29 (D.D.C. 2000), in which our colleague on this court rejected Secret Service agents' claims that they were retaliated against when they were "denied paid administrative leave to attend the deposition of the Secret Service agency

designee" in a federal employment discrimination case. In that case, the court noted that "[a]s courts within this Circuit and elsewhere have recognized, `there is no express provision in Title VII or its regulations granting an employee the right to administrative leave for judicial proceedings.'" Id. (citing Shelhorne v. Runyon, No. 95-0641,1997 U.S. Dist. LEXIS 13583, at *51(D.D.C. Aug. 21, 1997)). The court went on to state that "[a]dherence to an established agency policy regarding administrative leave also goes a long way in rebutting any inference of discrimination or retaliation that might otherwise be drawn from the denial of paid leave." Id. at 29. Here, McMenamin's original determination denying the plaintiff's request for administrative leave complied with the existing Negotiated Labor Management Agreement and MOA. The plaintiff, therefore, was unharmed by her supervisor's decision to deny administrative leave given that the plaintiff was not entitled to such leave and no reasonable jury could conclude otherwise based on the applicable law and agency agreements.

Notwithstanding the plaintiff's characterization of the October 5, 2001, memorandum as a "new" policy, the fact of the matter is that when the memorandum was circulated by the Office of Civil Rights it summarized existing law and agency agreements and was consistent with McMenamin's original determination that the plaintiff was not entitled to administrative leave and should be charged annual leave for attending witness depositions. Hence, after the October 5, 2001, memorandum was circulated, McMenamin sent the plaintiff an e-mail stating that the memorandum "indicates there is no change from the guidance I first sent to you on February 14, 2001." Pl.'s Opp'n Br. Ex.

16 (E-mail from McMenamin to Wiley with copies to Dillard and McMenamin of 10/9/01). Although the plaintiff takes issue with the fact that the agency waited until after the October memorandum was circulated to actually charge her annual leave,[6] that was a gamble the plaintiff took when she elected to continue attending witness depositions knowing that her supervisor had denied her request for administrative leave and was simply waiting for verification from Ohlhausen that her decision was correct. The gamble might have paid off if Ohlhausen's research ultimately revealed legal authority to grant an employee administrative leave to attend witness depositions. In the final analysis, however, it did not.

The plaintiff makes much of what she describes as the "eruption" of a "significant debate" about whether the October 5, 2001, memorandum constituted "new" policy that was being applied to the plaintiff retroactively. Pl.'s Opp'n Br. 2, 24-25. Even viewing the evidence in a light most favorable to the plaintiff, the so-called "debate" really involved a single official, Delia Johnson, who was the Director of the Office of Civil Rights and whose confusion appears to be the result of (1) her lack of knowledge about the fact that the plaintiff's supervisor denied the plaintiff's request for administrative leave to attend witness depositions from the outset and (2) her lack of knowledge about the existing law and provisions of the Negotiated Labor Management Agreement that applied once a complaint was filed in a federal district court, at which point Johnson no longer had "jurisdiction" over the matter. Ms. Johnson's confusion in either circumstance does not change the fact that 5 U.S.C. § 6322, the Negotiated Labor Management Agreement, and the MOA were in

place at the time the plaintiff originally requested administrative leave and her supervisor's decision to deny the requested leave complied with that law and agreement - as did the October 5, 2001, memorandum.

Having considered the facts in the light most favorable to the plaintiff, this Court is of the view that there are no material facts in dispute[7] and the evidence supports the conclusion that no reasonable jury would find the decision to charge the plaintiff annual leave for time she spent attending witness depositions to be materially adverse. The existing law, rules and agreements made clear that administrative leave was not available for the purpose the plaintiff sought, and the October 5, 2001, memorandum did not change that fact. There also is no evidence that any other employee was ever granted administrative leave - or not charged annual leave - under similar circumstances. Consequently, because no employee was authorized to take administrative leave to attend witness depositions in an employment discrimination case pending before a federal district court, no employee would have been injured or harmed by the agency's refusal to grant administrative leave and the corollary decision to charge annual leave for such time. Thus, the agency's decision to deny administrative leave in this case would not dissuade a reasonable worker from making or supporting a charge of discrimination. Because the decision to charge the plaintiff annual leave for the time she spent attending witness depositions complied with existing law, rules and agreements, the plaintiff suffered no injury or harm that rose to the level of a materially adverse employment action. As a result, the plaintiff is unable to establish a prima facie case of retaliation.

III. Whether the Plaintiff Rebutted the Agency's Legitimate, Non-retaliatory Reason for Denying Administrative Leave

For essentially the same reasons the plaintiff is unable to show that she was subjected to a materially adverse employment action, she also is unable to show that the agency's nonretaliatory reason for charging her annual leave for the time she spent attending witness depositions was pretext. The agency has argued, and the undisputed evidence shows, that when the plaintiff's supervisor originally denied the plaintiff's request to take administrative leave to attend witness depositions, she did so in compliance with 5 U.S.C. § 6322, the Negotiated Labor Management Agreement, and the MOA. Likewise, the agency's October 5, 2001, memorandum confirming that administrative leave was not authorized to attend witness depositions complied with the same law and agreement. Thus, the agency satisfied its burden of producing evidence of a legitimate nondiscrimonatory reason for charging the plaintiff annual leave for attending witness depositions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (stating that an employer meets its burden by explaining what it did or producing evidence of legitimate non-retaliatory reasons).

The plaintiff, however, proffered no evidence indicating that the agency's reason was pretext, such as evidence that 5 U.S.C. § 6322, the Negotiated Labor Management Agreement, and the MOA were not in existence at the time the plaintiff was attending witness depositions, that some other law or agreements affirmatively granted employees the right to administrative leave to attend witness depositions, or

that other employees were granted administrative leave or not charged annual leave in like circumstances. Instead, the plaintiff simply put forth the argument that Ohlhausen initially "instructed" her to take administrative leave, a fact that is in dispute but immaterial in light of Ohlhausen's February 15, 2001, e-mail; a conclusory argument that "no specific policy governing the use of official time to attend depositions of witnesses and co-parties existed as of February 2001," which is contradicted by 5 U.S.C. § 6322, the Negotiated Labor Management Agreement, and the MOA; and the plaintiff's assertion that the agency attempted to conceal discovery documents relating to an internal debate among agency officials about the import of the October 5, 2001, memorandum, which she believes is "persuasive circumstantial evidence that the true reason behind the Agency's actions was retaliatory animus." Pl.'s Opp'n Br. 21-25. None of the plaintiffs arguments "suffice[s] to establish a dispute substantial enough to withstand the motion for summary judgment." Clark County School Dist. v. Breeden, 532 U.S. 268, 274 (2001). Because the undisputed evidence in the record conclusively reveals a non-retaliatory reason for the agency's decision to charge the plaintiff annual leave for attending witness depositions, namely that it did so in compliance with existing law and agency agreements, and the plaintiff has failed to present sufficient evidence to discredit the agency's non-retaliatory reason, no reasonable jury could infer retaliation from the agency's decision to comply with existing law and agency agreements. See Samii v. Billington,195 F.3d 1, 3 (D.C. Cir. 1999) ("Once an employer articulates a legitimate, [non-retaliatory] reason for the challenged employment decision, the employer prevails unless the employee succeeds in

discrediting the employer's explanation.").

CONCLUSION

For the reasons set forth above, the Court will grant the defendant's Motion for Summary Judgment. An appropriate Order will accompany this Memorandum Opinion.

Thomas F. Hogan Chief Judge
October 2, 2006

Footnotes

1Pursuant to Rule 7(h) of the Civil Rules of the United States District Court for the District of Columbia, the defendant filed a Statement of Material Facts as to Which There is No Genuine Issue. The plaintiff filed no objections to the defendant's Statement of Material Facts as to Which There is No Genuine Issue, so the Court will deem those facts to be conceded by both parties. In accordance with the same rule, the plaintiff incorporated a Statement of Genuine Issues of Material Facts in Dispute into her legal brief filed in opposition to the defendant's Motion for Summary Judgment, to which the defendant objected.

2Throughout the pleadings and documentary evidence the term "administrative leave" is referred to interchangeably with the terms "official leave" and "court leave." Accordingly, when the Court refers to "administrative leave" in this opinion, that term should be understood to mean paid leave that is not charged to an employee's annual leave and encompasses both "official leave" and "court leave."

3Grace later stated that her e-mail to McMenamin "provided ... the substance of the provisions in the Manual of Administration (MOA) and the Negotiated LaborManagement Agreement which specified the circumstances when administrative leave is authorized." Def.'s Br. Ex. I (F2).

4There is evidence in the record indicating that some agency officials were confused about, or unaware of, the differences between the rules and regulations that apply to employment discrimination cases pending at the administrative level before the agency's Office of Civil Rights or the EEOC, versus employment discrimination cases pending in a federal district court. See McMenamin Dep. 27:17-28:12; Grace Dep. 34:6-35:10; Johnson Dep. 13:3-2.

5It also is noteworthy that the plaintiff claimed that, after reportedly being told by Ohlhausen that she could take administrative leave, she "felt [she] had complied with the rules set out in EEOC MD 110 Chapter 6, Section 15 paragraph c (1), which states that the complainant and the Agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of time." Def.'s Mem. Supp. Mot. for Summ. J. Ex. 1 (Rebuttal Statement of Verla Wiley). Setting aside the fact that Ohlhausen fairly immediately apprised the plaintiff that he was unsure whether she was entitled to administrative leave and would research the issue further, the Court observes that the record is devoid of any evidence whatsoever that the plaintiff ever actually arrived at a "mutual understanding" with any agency official, including Ohlhausen, about "the amount of official time to be used." To the contrary, the evidence

shows that the plaintiff left the office at will to attend witness depositions without any agreement with agency officials about the number of hours of leave, of any kind, she was permitted to take to attend such depositions.

6During the hearing held by the Court on August 25, 2006, the plaintiff argued that she was not necessarily disputing that she might not be entitled to administrative leave under the existing Negotiated Labor Management Agreement or MOA, but nevertheless challenged the agency's retroactive deduction from her annual leave time she spent attending witness depositions. The Court does not follow the plaintiff's logic, however. If the agency failed to charge her annual leave for the time she spent attending witness depositions, that would have been tantamount to granting her request for administrative leave since the result would have been the same - she would have been paid for the time spent attending witness depositions without an adverse impact to her annual leave. As the Court previously observed, however, the Negotiated Labor Management Agreement mandated that such leave "must be approved by the supervisor," which did not happen here.

The record also shows that, despite the plaintiff's claim that Ohlhausen "instructed" (Pl.'s Br. 6 at Par. 7) her to take administrative leave to attend witness depositions, and she reportedly did take such leave (id. at Par. 7), she did not document the leave as such on her time records or sign-out sheets. Grace Dep. 46:6-48:14; Def.'s Br. Exs. 1(F2) (Grace Aff.), 1 (G2) (time records reflecting how the plaintiff's time was recorded during

the period at issue), 4 (Booker Decl. Par. 9), 4B (E-mail from Booker to Welch of 10/26/01). This evidence was never challenged by the plaintiff; however, the plaintiff asserts that it is a disputed question of fact whether agency employees were required to document administrative leave, or did so as a matter of practice. Pl.'s Br. Pars. 34-35. The Court does not find this disputed fact to be material because it goes to the question of the plaintiff's credibility, which the Court will not consider for the purpose of resolving the pending motion. See District Intown Props. Ltd., 198 F.3d at 878.

7The plaintiff identified a number of facts that she argues are material and in dispute. Pl.'s Br. 3-14. Many of the purportedly disputed facts, however, actually appear to be in agreement between the parties. See Response to Pl.'s State. of Genuine Issues. Of the remaining facts, to the extent not otherwise discussed in this Memorandum Opinion, the Court found the facts to be immaterial and inconsequential to the determination of whether the plaintiff was retaliated against when the agency charged her annual leave for attending witness depositions.

No. 06-5402

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERLA M. WILEY,
APPELLANT

v.

JAMES K. GLASSMAN, CHAIRMAN OF THE BROADCASTING BOARD OF GOVERNORS,
APPELLEE

March 12, 2008, Filed

JUDGES: BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

No. 06-5402

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERLA M. WILEY,
APPELLANT

v.

JAMES K. GLASSMAN, CHAIRMAN OF THE
BROADCASTING BOARD OF GOVERNORS,
APPELLEE

JUDGES: BEFORE: Brown and Griffith, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing filed January 28, 2008, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

Filed 52/6/04
Civ. No. 99-975 (TFH)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

KEMI SOUTHEY-COLE, et al.
Plaintiffs,
v.
KENNETH Y. TOMLINSON, Chairman, Broadcasting Board of Governors,
Defendant.

REPORT AND RECOMMENDATION

This above-captioned case was referred to the undersigned by the trial court pursuant to 28 U.S.C. §636(b)(1) and Local Rule 72.3(a) for a Report and Recommendation on Defendant's Partial Motion to Dismiss or for Summary Judgment ("Motion") [70]; Defendant's Motion to Strike Portions of Plaintiff's Opposition ("Motion to Strike") [131]; and Defendant's Motion to Strike Some Exhibits ("Motion to Strike Exhibits") [132]. The undersigned held a hearing on all three motions on October 23, 2003.[1]

Plaintiff, Verla Wiley ("Wiley" or "Plaintiff") initiated this action on April 16, 1999, alleging that her employer, the Broadcasting Board of Governors (the "Agency" or "Defendant") discriminated against her in terms of training, evaluations, and promotion opportunities because of her gender and race.[2] Plaintiff claims that her supervisor, Barry Maughan ("Maughan"), "denied Ms. Wiley's several requests for promotion to the GS-13 level in late 1997 and early 1998; he denied her on the job training for the managing editor position in 1997; and he saw to it that Ms. Wiley

was consistently evaluated below her male counterparts." Opposition to Motion ("Opposition") at 1. Wiley also claims that the Agency retaliated against her for engaging in the Equal Employment Opportunity ("EEO") process, in violation of Title VII of the Civil Rights Act of 1964, as amended. Wiley alleges that Defendant denied her subsequent requests for promotion, denied her a chance to act as Managing Editor, retroactively took leave from her, and significantly reduced her on-air responsibilities. Opposition at 1. Wiley additionally claims she was subjected to a hostile work environment based on her gender.

Defendant moves for a partial dismissal and for summary judgment on grounds that Plaintiff's race and gender discrimination and retaliation claims fail to establish a prima facie case, and furthermore, Plaintiffs retaliatory harassment claims must be dismissed for failure to exhaust administrative remedies and/or failure to establish a prima facie case.

I. BACKGROUND

A. Factual Background

Plaintiff, Verla Wiley, an African-American female, was originally hired by the United States Information Agency ("USIA") as a GS-2 clerk typist in 1966.[3] Defendant's Memorandum of Points and Authorities in support of Motion ("Defendant's Points and Authorities") at 8. In 1977, she became a Trainee Radio Writer in the English-to-Africa Branch of the Africa Division of Voice of America ("VOA"). Id. She was promoted in 1978 to the GS-7 position of Radio Writer, and she received a promotion to GS-9 in 1980. Id. In 1982, she reached the GS-11 level, which was

then the full-performance level of that position, and in 1983, Wiley's position title was changed to International Radio Broadcaster ("IRB"), and the top grade for that position was raised from GS-11 to GS-12. Defendant's Points and Authorities at 9. Wiley was subsequently promoted to a GS-12, step 1, by way of an accretion of duties promotion. Id. at 9. The full performance level of the IRB position was and remains GS-12. See Supplemental Declaration of Donna Grace ("Grace Declaration")[4], Par. 79; see also Defendant's Exhibit 20 (Standard Form 50). Since 1983, Wiley has received all within grade increases for which she was eligible and she is currently a GS-12, step 9. Grace Declaration, Par. 79.

Throughout the 1980's, Wiley acted as managing editor for the show Nightline Africa. See Wiley May 24, 2001 Deposition ("First Wiley Deposition"), Plaintiff's Exhibit 2, at 32-33; Defendant's Statement of Material Facts as to which there is No Genuine Issue ("Defendant's Material Facts") at 105. Wiley has been the coordinator and host of the Americana section of Africa World Tonight since 1992. Opposition at 3, citing Defendant's Points and Authorities at 8. As the Americana coordinator, Wiley is responsible for the music, Americana, science and development features in Africa World Tonight's "back half' of the show.[5] Defendant's Material Facts at 122. Wiley gathers material for the show, organizes and assembles the show's content, develops themes, edits taped stories and develops original stories and interacts with reporters. Opposition at 3, citing Wiley Deposition at 106.

Barry Maughan was the Chief of English-to-Africa ("EA") Branch from 1995 through 1998. Defendant's Points and Authorities at 4. During his

tenure, the EA Branch staff included approximately twenty full-time employees, one part-time employee and several Purchase Order Vendors. Id., see Maughan Declaration Par. 8. In general, EA Branch employees are classified into either IRBs or Radio Production Specialists ("RPS" or "producers"). Maughan Declaration, Par. 8. IRBs provide original material for EA programming, including conducting interviews, writing stories, and hosting programs. Maughan Declaration, Par. 9. IRBs who broadcast in English are generally classified as GS-9,11, or 12 employees. Id. The principal difference between GS-9/11 and GS-12 level IRB employees is that the GS-12 employees initiate more original work, produce more programming material and require less supervision than GS-9 and 11 level employees. Id.; McMenamim Declaration, Par. 12.[6]

During Maughan's tenure, the EA Branch employed ten GS-12 IRB employees, in addition to the three Plaintiffs, and eight GS-13 IRB employees.[7] Grace Declaration, Par. 47; Defendant's Exhibit 18 (list of employees). During the time that Maughan was Chief of the EA Branch, six radio programs, including Africa World Tonight ("AWT"), were under his supervision. Maughan Declaration, Par. 5. AWT, airing live in Africa in the evening, Monday through Friday, was broadcast in three separate editions. McMenammn Declaration, Par. 6. The first edition aired at 12:30 p.m. EST and was one-half hour long. Id. The second and third editions were each one-hour in length and aired at 2:00 p.m. EST and 4:00 p.m. EST, respectively. Id.

B. Procedural History

Plaintiff filed complaints of discrimination with the Office of Civil Rights ("OCR") on February 3, 1998,

and on March 2, 1998. See Delia L. Johnson Declaration, Pars. 4, 42, and Exhibits 28 and 30 thereto.[8] On May 14, 1998, OCR sent a letter to Plaintiff setting forth the allegations accepted for processing with respect to her two complaints (hereinafter "OCR-9815"). See Johnson Declaration, Par. 47, and Exhibit 32 attached thereto. On July 13, 1998, the complaints were assigned to an independent contractor, C. Sukari Hardnett of H & H Associates, for investigation. Johnson Declaration, Par. 18. Hattie Baldwin, the former OCR Director, subsequently became concerned with the manner in which the investigation was being conducted and she consequently terminated OCR's contract with H & H Associates. See Defendant's Memorandum of Points and Authorities at 9, citing Deposition of Delia L. Johnson at 34. On November 20, 1998, prior to the completion of any report of the investigation, and consistent with its authority, OCR made the independent determination to reassign the investigations to two different independent contractors, Richard T. Qualters and James Gee. Johnson Declaration, Par. 18.

Wiley's EEO complaint spans the period of four years during which Maughan was Chief of the EA Branch, and it names Maughan and Steve Lucas ("Lucas"), then Chief of the African Division, as individuals who discriminated and retaliated against her and created a hostile work environment.[9]

In her Amended Complaint and Opposition to Defendant's Partial Motion to Dismiss and for Summary Judgment, Plaintiff presents an array of allegations alleging discriminatory and retaliatory actions by Defendant. For completeness of the record, the undersigned will address each asserted claim of

discrimination and retaliation in the Report and Recommendation.

II. LEGAL STANDARD

A. Motion to Dismiss

Under Fed. R. Civ.12(b)(6), if a plaintiff fails to state a claim upon which relief can be granted, a court may grant a defendant's motion to dismiss. Hishon v. King & Spaulding, 467 U. S. 69, 73 (1984); Sparrow v. United Air Lines, Inc., 216 F. 3d 1111,1114 (D.C. Cir. 2000). In evaluating a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and give the plaintiff the "benefit of all inferences that can be derived from the facts alleged." Schuler v. United States, 617 F. 2d 605, 608 (D.C. Cir.1979); see also Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." Wiggins v. Hitchens, 853 F. Supp. 505, 508 n.1(D.D.C.1994) (citation omitted); Haynesworth v. Miller, 820 F. 2d 1245, 1254 (D.C. Cir.1987).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. Scheuer, 416 U.S. at 235. If the allegations contained in the complaint, when taken as true, fail to state a claim for which relief may be granted, or otherwise establish that the complaint faces "some insuperable bar to relief," the motion should be granted. Franklin Asaph Limited Partnership v. FDIC, 794 F. Supp. 402, 404 (D.D.C. 1992).

B. Summary Judgment

A court should grant summary judgment if the

pleadings, depositions, answers to interrogatories, and affidavits demonstrate that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Tao v. Freeh, 27 F. 3d 635, 638 (D.C. Cir. 1994). Although a court should draw all reasonable inferences from the records submitted by the nonmoving party the mere existence of a factual dispute, by itself, is insufficient to bar summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The adverse party's pleading must demonstrate the existence of a genuine issue of material fact. See id. To be genuine, the issue must be supported by sufficiently admissible evidence such that a reasonable trier of fact could find for the nonmoving party. In determining materiality, the factual assertion must be capable of affecting the substantive outcome of the litigation. See id.; see also Laningham v. U.S. Navy, 813 F. 2d 1236, 1242-43 (D.C. Cir. 1987).

Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment. The nonmoving party bears the affirmative duty to present, by affidavits or other means, specific facts showing that there is a genuine issue for trial. Anderson, 477 U.S. at 248-49. The adverse party must do more that simply "show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In the context of discrimination cases, summary judgment should be approached with caution because of the difficulty of proving discriminatory intent and disparate treatment. See Morgan v. Federal Home Loan Mortgage Corp., 172 F. Supp. 2d 98, 104

(D.D.C. 2001)("While summary judgment must be approached with special caution in discrimination cases, a plaintiff is not relieved of [his] obligation to support [his] allegations by affidavits or other competent evidence showing that there is a genuine issue for trial.") (citation omitted). This does not however eliminate the use of summary judgment in discrimination cases. See, e.g., Clark County School District v. Breeden, 532 U.S. 268, 271(2001) (finding the District Court's grant of summary judgment was proper, therefore overturning the decision by the Court of Appeals); Forkkio v. Powell, 306 F. 3d 1127, 1132 (D.C. Cir. 2002) (upholding grant of summary judgment for defendant in Title VII case alleging racial discrimination and retaliation); Brown v. Brody,199 F. 3d 446, 448 (D.C. Cir.1999) (upholding summary judgment in favor of defendant in a Title VII suit alleging racial and gender discrimination and retaliation).

In Celotex, the Supreme Court instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327, quoting Fed. R. Civ. P. 1.

1. Title VII Claims

In McDonnell Douglas v. Green, 411 U.S. 792 (1973), the Supreme Court established a burden-shifting framework that governs the analysis of racial discrimination and retaliation claims. See, e.g., Aka v. Washington Hospital Center, 156 F. 3d 1284,1288-89 (D.C. Cir. 1998); McKenna v. Weinberger, 729 F. 2d

783, 790 (D.C. Cir. 1984); Richard v. Bell Atlantic Corp., 165 F. Supp. 2d 1, 6-7 (D.D.C. 2001); Hastie v. Henderson,121 F. Supp. 2d 72, 78 (D.D.C. 2000). The plaintiff bears the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the action. Id.

The defendant's burden is one of production, not of proof. See Aka, 156 F. 3d at 1289 ("[I]n producing nondiscriminatory reasons for its challenged action, the employer is not obligated to support these reasons with objective evidence sufficient to satisfy the preponderance of the evidence standard.") (quotation and citation omitted). Therefore, defendant's burden is satisfied if it simply explains what it has done or produces evidence of legitimate, nondiscriminatory reasons. St. May's Honor Center v. Hicks, 509 U.S. 502 (1993).

If the defendant meets this burden, the presumption of discrimination is rebutted and drops from the case. St. May's Honor Center, 509 U.S. at 508. The plaintiff must then show that the articulated reason was a pretext and the actual reason was discriminatory. McDonnell Douglas, 411 U.S. at 804. The ultimate burden of persuasion always remains with the plaintiff to prove that he or she was subjected to discrimination. St. Mary's Honor Center, 509 U.S. at 507-08. A plaintiff cannot create a factual issue of pretext based merely on personal speculation of discriminatory intent. Greene v. Dalton, 164 F. 3d 671, 675 (D.C. Cir. 1999) (claims cannot rest "entirely upon a conclusory representation" by plaintiff); Handing v. Gray, 9 F. 3d 150, 154 (D.C. Cir. 1993) (unsupported speculation is not enough to defeat a summary

judgment motion; the existence of specific material evidentiary facts must be shown). "The non-moving party's opposition ... must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing there is a genuine issue for trial." Marshall v. Shalala, 16 F. Supp. 2d 16, 18 (D.D.C. 1998) (citation omitted). See also Hayes v. Shalala, 902 F. Supp. 259, 263 (D.D.C. 1995) (opposition to summary judgment must consist of more than mere unsupported allegations or denials.)

In order to prove a pima facie retaliation claim, the plaintiff must show that: (1) he engaged in statutorily protected activity; (2) the employer subjected him to an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. Brodetski v. Duffey,199 F.R.D. 14, 19 (D.D.C. 2001); Hastie,121 F. Supp. 2d at 79-80. Causation is often demonstrated by temporal proximity, and "[a]lthough courts have not established the maximum time lapse between protected Title VII activity and alleged retaliatory actions for purposes of establishing a causal connection, courts generally have accepted time periods of a few days up to a few months and seldom have accepted time lapses outside of a year in length." Brodetski,199 F.R.D. at 20.

2. Exhaustion of Administrative Remedies

The District of Columbia Circuit has stated that the EEOC has been given "broad authority to enforce [Title VII's] antidiscrimination mandate within the federal government, including responsibility for issuing regulations to control federal agencies' processing of discrimination complaints." Bowden v.

United States, 106 F. 3d 433, 437 (D.C. Cir. 1997) (citing 42 U.S.C. §2000e-16(b)). Before suing under Title VII, an aggrieved party must exhaust his administrative remedies by filing a charge of discrimination with the EEOC within 180 days of the alleged discriminatory incident. See 29 U.S.C. §626(4)(1) (1994); 42 U.S.C. §2000e5(e)(1) (1994); Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F. 3d 1363 (D.C. Cir. 1998). Exhaustion of this administrative remedy is a prerequisite to judicial relief. Siegel v. Kreps, 654 F. 2d 773, 776-77 (D.C. Cir. 1981). See also National Railroad Passenger Corp. v. Morgan, 536 U.S.101,108 (2002) ("[S]trict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.") (citation omitted).

Failure to comply with these requirements does not erect a jurisdictional bar to suit, but is an affirmative defense which the defendant must plead and prove. Morgan, 536 U.S. at 121-22; Bowden v. U.S., 1106 F. 3 d at 437. "If the defendant meets its burden, the plaintiff then bears the burden of pleading and proving facts supporting equitable avoidance of the defense." Bowden, 106 F. 3d at 437 (citations omitted). This 180-day time limit is thus treated as a statute of limitations, which is subject to waiver, estoppel and tolling, but these equitable doctrines must be applied sparingly. Morgan, 536 U.S. at 103; Bowden, 106 F. 3 d at 437; Jarmon v. Powell, 208 F. Supp. 2d 21, 26 (D.D.C. 2002). Accordingly, as a general rule, a Title VII claim can only be based upon misconduct that the Plaintiff complained of in a timely-filed administrative complaint before the EEOC. Shehadeh v. Chesapeake and Potomac Telephone Co., 595 F. 2d 711, 724 (D.C. Cir.1978).

III. ANALYSIS

A. Motion to Dismiss Plaintiffs Allegations of Misconduct by OCR

Plaintiff alleges that the Agency demonstrated "contempt" of applicable EEO laws by wrongfully terminating a contract its OCR had entered into with an EEO investigator, C. Sukari Hardnett ("Hardnett") of H & H Associates, to investigate the allegations accepted for processing in the Plaintiff's underlying administrative complaints. See Amended Complaint, Pars. 23, 24. Plaintiff challenges the Agency's conclusions that Hardnett was not objective when she conducted the investigation, instead claiming that the Agency terminated the investigation in retaliation for Plaintiff's filing of EEO complaints. See id., Par. 24. Defendant moves to dismiss this claim for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12 (b)(6).

Defendant disputes that the investigation was terminated for any retaliatory reason; instead, Defendant contends that OCR received multiple complaints from persons interviewed by Hardnett during her investigation, relating to Hardnett's appearance of bias and her use of improper investigative procedures. See Johnson Deposition at 34. Because OCR requires that a contract EEO investigator must be and must maintain the appearance of being unbiased, objective and thorough, OCR subsequently terminated its contract with Hardnett and re-assigned the Plaintiff's complaints to separate investigators so that the new investigators could process the complaints more expeditiously. See Supplemental Johnson Declaration, Pars. 10, 18.

Defendant further argues that Title VII does not provide a right of action against EEO offices, located within federal agencies, for mishandling of complaints or use of improper procedures to investigate complaints. Brodetski v. Duffy, 2001 U.S. Dist. LEXIS 12590 (D.D.C. March 28, 2001); Storey v. Rubin, 976 F. Supp. 1478, 1484 (N.D. Ga. 1997) ("Congress has not explicitly created a right of action against the EEOC or any other agency based upon the handling of a [sic] administrative complaint of discrimination [and it is also] well settled that charging parties do not have an implied remedy against the EEOC or any other agency arising from the handling of a charge or decision.") (citation omitted). See also Svenson v. Thomas, 607 F. Supp. 1004, 1005 n. 1 (D.D.C. 1985) (holding that plaintiff may not bring a Title VII lawsuit against the EEO office within the Department of Labor for alleged deficiencies in its processing of the plaintiff's EEO complaints.)

Defendant additionally argues that Plaintiff, by failing to respond to Defendant's allegations in its motion to dismiss, has abandoned and conceded any Title VII claim against OCR. See Local Civil Rule 7.1(b); Carter v. George Washington University, 180 F. Supp. 2d 97, 109 (D.D.C. 2001); Waterhouse v. District of Columbia, 124 F. Supp. 2d 1, 3 (D.D.C. 2000), aff'd, 298 F. 3d 989 (D.C. Cir. 2002) ("since plaintiff has not opposed defendants' motion with respect to Count II, which alleges a hostile work environment, the Court finds that the motion is conceded as to that count"); Stephenson v. Cox, 223 F. Supp. 2d 119, 121 (D.D.C. 2002) ("when a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded, even when the result is dismissal of the

entire case"). Plaintiff does not address Defendant's motion to dismiss her allegations against OCR except to note that "Wiley does not treat the misconduct by the Office of Civil Rights as an adverse employment action in itself [but,] [i]nstead she treats it as part of the retaliatory harassment that was targeted against her by the defendant. . . ." Opposition at 21. Accordingly, in light of the case law cited by Defendant coupled with Plaintiff's failure to rebut Defendant's allegations in its motion to dismiss, the undersigned recommends that Plaintiff's claims against OCR be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). B. Summary Judgment relating to Plaintiffs Discrimination Claims Plaintiff's gender and/or racial discrimination claim consists of four separate components. First, Wiley claims that she received a less than outstanding performance evaluation. Second, Plaintiff alleges that she experienced disparity in training and/or assignments. Third, she contends that her co-workers were not disciplined in an appropriate manner. Fourth, she asserts that she was denied promotional opportunities allowing her to advance to a GS-13 level. See generally Defendant's Memorandum of Points and Authorities at 21.

The requirements for a prima facie case of racial discrimination are flexible and vary depending on the type of case. McDonnell Douglas, 411 U.S. at 804. To establish a claim of discrimination, the plaintiff must prove that (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; and (3) the adverse action gives rise to an inference of discrimination. Stella v. Mineta, 284 F. 3d 135, 144-45 (D.C. Cir. 2002) (citation omitted). In Brown v. Brody, the D. C. Circuit Court of Appeals held that a plaintiff must demonstrate an "adverse personnel action" in

order to make out a prima facie case of discrimination or retaliation under Title VII. Brown v. Brody,199 F. 3d 446, 455 (D.C. Cir.1999).

In discussing what constitutes an "adverse personnel action" the Brown court rejected the contention that "any sort of personnel action undertaken for discriminatory reasons suffices," instead finding that a plaintiff must demonstrate that the defendant's action either affected a promotion or caused other tangible or economic loss. Id. at 456-57 (citation omitted). The Brown court held that an actionable employment action must constitute "a significant change in employment status, such as firing, hiring, failing to promote, reassignment with significantly difference responsibilities, or a decision causing a significant change in benefits." Id. at 456 (quoting Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

Defendant argues that Plaintiff is unable to demonstrate that she suffered any adverse personnel action relating to performance evaluations, training and assignments, disciplinary actions and opportunities for promotion, and therefore, she cannot prove a prima facie case. Each of Plaintiff's four claims will be discussed in turn below.

1. Plaintiff's Performance Evaluations

Performance Appraisal Reports (PARs) are completed for government employees on an annual basis, and there are five possible ratings: Outstanding, Highly Successful, Fully Successful, Minimally Successful, and Unsuccessful. See Supplemental Grace Declaration, Par. 48. To receive an "Outstanding" rating, all critical elements must be rated as

"Outstanding" and no more than two non-critical elements may be rated as low as "Highly Successful." Id. at Par. 49. An employee who receives at least a "Fully Successful" rating in a year in which the employee is due to receive a Within Grade Increase ("WGI") is automatically moved to the next step within a given grade level. Id. at Par. 50. To be eligible for a promotion within an employee's career ladder, the employee must receive at least a "Fully Successful" on their most recent PAR. Id. at Par. 56. Receiving a "Highly Successful" or "Outstanding" rating on one's most recent PAR is not a prerequisite for applying for any competitive position. Id.

In the instant case, Plaintiff challenges her 1998 rating of "Highly Successful," alleging that she should have instead received an "Outstanding" rating even though she never received an "Outstanding" rating during the eighteen years she has been an IRB. First Wiley Deposition at 15-16,163,167. In fact, Wiley has received a "Highly Successful" performance evaluation every year since 1995. See Charlotte Large Declaration, Par. 5, and Exhibit 1 attached thereto (compilation of PARs).[10]

Defendant asserts that Wiley's rating of "Highly Successful" was not adverse because it did not affect the terms, compensation, or conditions of her employment. Plaintiff concedes this assertion insofar as she fails to address this claim in her Opposition and provides no evidence demonstrating that receipt of a "Highly Successful" rating as opposed to an "Outstanding" rating adversely affected her.[11] Marshall v. Shalala,16 F. Supp. 2d 16,18 (D.D.C.1998) (where plaintiff's brief in opposition was unresponsive to many of defendant's arguments why plaintiff was unable to establish a prima facie case of discrimination, the court

assumed that those arguments were conceded), Greene v. Dalton,164 F. 3d 671, 675 (D.C. Cir. 1999) (plaintiff must provide supporting facts for his or her allegations, as opposed to mere conclusory statements). Accordingly, the undersigned recommends that the trial court grant summary judgment in favor of Defendant on Plaintiff's claim that she experienced discrimination based on her performance ratings.

2. Training and Assignments

Although Wiley claims that she was denied formal training, during her deposition she acknowledged she has taken more than 50 mass communication-related courses. Wiley May 24, 2001 Deposition at 26. More specifically, between 1994 and 1998, Maughan approved and Wiley took a number of union-related courses, including training for union stewards, Reduction in Force training, and arbitration training. Id. at 28. During the time that Maughan was Chief of the EA Branch, Wiley can only recollect one course she was not permitted to attend, a writing course offered in 1998. Id. at 29. She acknowledged, however, that no one attended this course in lieu of her. Id. at 29-30. Moreover, Wiley cannot establish that any alleged denial of training constitutes an adverse action. Under Brown v. Brody and its progeny, the plaintiff must demonstrate a tangible or economic loss to establish an adverse employment action. See Freedman v. MCI Telecommunications Corporation, 255 F. 3d 840, 846 (D.C. Cir. 2001) (although denial of training may rise to the level of an adverse action, plaintiff was not "hobbled" by a training period shorter than other employees). Plaintiff in this case has not demonstrated or even alleged any ill effect in the terms, compensation, or conditions of her employment resulting from her inability to attend this writing

course. In the absence of any evidence to support her claim, the undersigned therefore recommends that Defendant be granted summary judgment in connection with Plaintiff's claim that she was denied formal training.

Wiley also alleges that Maughan denied her the opportunity to train to be a Managing Editor. Wiley May 24, 2001 Deposition at 30. Plaintiff further asserts that "Mr. Maughan's denial of Managing Editor Training put [her] at a disadvantage with regard to employment, and limited her future employment opportunities." Opposition at 34, referencing Maughan's November 18, 1997 Memorandum [Opposition Exhibit 22]. Wiley's statement is inconsistent with her deposition testimony wherein she stated that, during the 1980's, she performed managing editor duties daily, and accordingly would not need training to perform such duties. See First Wiley Deposition at 28-29, 32-33. Furthermore, Wiley concedes that during the time Maughan was Chief of the EA Branch, she never volunteered to shadow a managing editor in order to gain experience as a managing editor. Wiley June 15, 2001 Deposition ("Second Wiley Deposition") at 259. This is consistent with Maughan's Declaration indicating that "Wiley never expressed an interest in becoming a managing editor. . . [demonstrated by the fact that she] did not work in any of the positions ... that lead to the competence necessary to become managing editor." Maughan Declaration at Par. 31. Moreover, when Wiley became vice president of the union in 1990, she admits that she could not be managing editor because of her increased union responsibilities. First Wiley Deposition at 34-35.[12] Notably, she served as vice-president of the union during the entire time Maughan was Chief of the EA Branch. The record

evidence in this case indicates that Wiley did not pursue a managing editor position nor would she have been able to do so because of the union position she held. Whey's claim that she was denied training for the managing editor position is contradicted by the record evidence in this case, and furthermore, Wiley fails to demonstrate that she suffered any adverse employment action resulting from any alleged denial of training. The undersigned recommends that Defendant be awarded summary judgment on Wiley's claims of discrimination based on denial of training.

Wiley also claims that she received less favorable assignments because of her gender and race. The assignment system in the EA Branch operated in the following manner. Each week, an EA Assignment Schedule was given to all staff members to provide advance notice of his or her duties and responsibilities for the coming week. The schedule lists which staff member is assigned a particular duty for each day. Maughan Declaration, Par. 20, Exhibit 2 [schedule]. Staffers who were assigned as reporters on any particular day were expected to arrive early and divide the top stories among themselves with input from the managing editor. Id. The morning meeting occurred each weekday for 20 minutes, commencing at either 8:10 a.m. or 9:10 a.m. The meeting was designed as an open forum whereby staffers were expected to present their story ideas and opinions about subjects to be broadcast. Maughan Declaration, Par. 21, Plaintiff claims that she wanted a larger number of stories on the air, including some about women's issues, along with more positive stories and fewer violent stories. See Plaintiffs' Supplemental Responses to Defendant's Interrogatories, Pars. 17-18.

In her Opposition, Plaintiff does not argue that

any rejection of her story ideas caused her to suffer any "tangible" harm nor did she proffer any argument on this issue during the hearing on this Motion. There is no record evidence supporting this claim and furthermore, Plaintiff appears to have abandoned this claim. Accordingly, because Plaintiff fails to produce a prima facie case of discrimination in assignments, the undersigned recommends that Defendant be granted summary judgment on this claim.

3. Discipline in the Workplace

Wiley asserts that there was disparity regarding application of the policies governing disciplinary actions, and time and attendance, when in fact, there is no record evidence supporting her claim." Plaintiff instead concedes that during the time Maughan was Chief of the EA Branch, she was never disciplined. See Wiley June 15, 2001 Deposition at 241; Maughan Declaration, Par. 57. During the same period of time, three male employees were disciplined. Maughan Declaration, Pars. 53-55; Grace Declaration, Pars. 73-75. Plaintiff fails to show that she suffered any adverse action and consequently fails to establish a prima facie case regarding this claim. The undersigned therefore recommends that summary judgment be granted in favor of Defendant on her claim of discrimination based on alleged disparity in the manner in which her EA Branch co-workers were disciplined. [14]

4. Plaintiffs Failure to be Promoted to a GS-13 Position

Plaintiff argues that she was discriminated against on the basis of gender and race when she was not promoted to a GS-13 position. Wiley is a GS-12

International Radio Broadcaster. The full performance level of her position is GS-12. Supplemental Grace Declaration, Pars. 9 36. In a situation where an employee has reached the full performance level of their position, there are two ways in which that employee could be promoted outside the career ladder, competitively, or non-competitively. Id. at Par. 55. In order to be promoted competitively, an employee must apply for a position bearing a higher job classification. Grace Declaration, Par. 57. Wiley admitted during her deposition that she never applied for a position at VOA at the GS-13 level [a competitive promotion]. Wiley May 24, 2001 Deposition at 135-136.

There are two ways in which an employee may be promoted non-competitively: l) an accretion of duties promotion and 2) an "impact" promotion, based on performance of exemplary work providing a continuing contribution. According to Ms. Grace, "impact" promotions within the Agency are extremely rare, and in fact, since 1995, no Agency employee has received an "impact" promotion. Id. at Pars. 63-64. To obtain an accretion of duties promotion, the employee must request an evaluation by a classification specialist, commonly called a "desk audit," to determine whether that person's responsibilities have increased beyond their original job description. Grace Declaration, Par. 59. Wiley claims that she asked Maughan for a promotion in September 1997. Opposition at 26. In 1998, Wiley was offered and declined a desk audit of her position. See Supplemental Grace Decl. at Par. 50, Wiley May 24, 2001 Deposition at 134-135.

Defendant submits that the Agency worked with Wiley to help her obtain the promotion she desired when it contracted with an outside contractor for a classification review of Wiley's position but Wiley told

Janet Davis, an Agency employee, that she did not want anyone to audit her position. See Reply at 8-9, citing Wiley Opposition Exhibit 41 (note to record from Janet Davis); see also Grace Declaration, Par. 50, Wiley May 24, 2001 Deposition at 134-135. Because Wiley declined the desk audit, she is unable to show that she was "qualified" for an accretion of duties promotion to the GS-13 level, and therefore unable to satisfy all the elements of a prima facie case of discriminatory non-promotion. See Marshall v. Shalala,16 F. Supp. 2d 16 (D.D.C. 1998), wherein this Court determined that:

> Plaintiff, too, always had the opportunity to be non-competitively promoted through the `desk audit' process, but it is undisputed that ... [he] never applied. . . "Having failed to apply for a promotion to a higher grade, [he] cannot now complain ... In fact, that opportunity existed all along and he simply failed to seize it. Because plaintiff failed to take even the most elementary step necessary by applying for a promotion to the GS-13 level, this Court finds that plaintiff has failed to establish a prima facie case of discriminatory non-promotion.

Id. at 20. See also McClamb v. Rubin, 932 F. Supp. 706, 716 (M.D.N.C. 1996) (Because plaintiff did not request a desk audit, she "did not go through the only procedure that the IRS uses to promote employees noncompetitively. Therefore, she has not made out her prima facie case.")

Because Wiley's claim is not that she was denied a promotion to a vacant position but instead that she was denied increases in pay or grade, the prima facie case inquiry varies from that set forth in

McDonell-Douglas. See Cones v. Shalala,199 F. 3d 512, 516-17 (D.C. Cir. 2000). In order to prove a prima facie case, she must show that: 1) she belongs to a protected class; 2) she qualified for and applied for a promotion; 3) she was considered for and denied the promotion; and 4) other employees of similar qualifications who were not members of the protected group were promoted at the time plaintiff's request was denied. Bundy v. Jackson, 641 F. 2d 934, 951(D.C. Cir. 1981); Cones, 199 F. 3d at 517.

Plaintiff contends that Maughan had the authority to make promotions, subject to review by personnel for availability, and subject to "advice" by his direct supervisor, Steven Lucas. Lucas Deposition at 31, 55. Plaintiff also asserts that Maughan had the ability to initiate an accretion of duties promotion for her, as he did with Joseph DeCapua ("DeCapua"). Maughan Deposition at 44-45 (emphasis added).[15] According to Wiley, Maughan told her that her request for a promotion was not justified because there were no supervisory duties associated with her job. Maughan Deposition at 87. Plaintiff also alleges that Maughan failed to inform her of the criteria necessary for advancement to the GS-13 IRB level. Id. (stating that Maughan believed Ms. Depew informed Wiley of the criteria for promotion to GS-13). Whether or not Maughan failed to inform Plaintiff of the criteria for advancement or told her that a promotion was not justified does not satisfy any element of the pima facie case.

Furthermore, Wiley cannot show that anyone similarly situated was promoted when she was not, although she attempts to compare herself with DeCapua.[16] Plaintiff concludes that she and DeCapua had similar qualifications because "[b]oth had

significant experience in the radio broadcast industry, both were international Radio broadcasters, and both were GS-12s." See Reply at 11. The foregoing is insufficient to demonstrate that the two were similarly qualified; see Neuren, 43 F. 3d at 1514 (Title VII plaintiff must "demonstrate that all of the relevant aspects of [his or] her employment situation were `nearly identical' to those of [employees in the favored category]."); Valentino v. United States Postal Service, 674 F. 2d 56, 69 (D.C. Cir. 1982). DeCapua, a Caucasian male, was the only employee who was promoted to a GS-13 during Maughan's tenure as EA Branch Chief, but he was not similarly situated to Plaintiff because he had different job responsibilities. DeCapua's responsibilities included planning, preparation and overall production of regional programs that air for up to two hours. Depew Declaration, Par. 7. He wrote, rewrote, and edited program material. Id. He also produced news, news feature and magazine programs targeted to African audiences. Id. Additionally, he voiced live and prerecorded programs and program segments of various types. Id. Comparing the differences in job responsibilities of Plaintiff and DeCapua, Defendant asserts that their employment situations were not nearly identical. See Mungin v. Katten Muchin & Zavis, 116 F. 3d 1549,1554 (D.C. Cir. 1997) (where plaintiff [a lawyer] claimed that his starting salary was discriminatorily low but failed to compare himself with associates in nearly identical employment situations). Furthermore, under federal regulations, "classifications are performed by comparing an individual's duties with the relevant classification standards, not by comparing an individual's duties with the duties performed by other employees." Bailey v. Nat'l Archive & Records Admin.,

236 F. 3d 1373, 1381 (Fed. Cir. 2001) (citing 5 C.F.R.§§511.601-511.616).

Wiley fails to present any evidence regarding her classified duties and responsibilities as a GS-12 IRB, such as her official position description. She similarly fails to present any evidence documenting the duties and responsibilities of GS-13 IRBs, such as DeCapua. Nor does Wiley proffer any evidence that, at the time she requested a promotion in September 1997, her duties had been increased beyond the original classified duties of her GS-12 position in a manner that warranted reclassification of her position to GS-13. See Harris v. Secretary, U.S. Dept. of Army, 119 F. 3d 1313,1321 (8th Cir. 1997). Moreover, she presents no evidence that she was performing GS-13 duties. See Bailey v. Natl. Archives Records Admin, 236 F. 3d 1373, 1381 (Fed. Cir. 2001). Nor does she present evidence regarding the specific criteria that must be considered when evaluating whether a position has accreted duties thereby warranting a reclassification, such as the reclassification standards referred to by Ms. Grace in her Declaration. Plaintiff cannot establish a pima facie case on her non-promotion claim based on gender discrimination and the undersigned therefore recommends that Defendant be granted summary judgment on this claim.

Plaintiff has not proffered evidence demonstrating that she was qualified for a promotion or that DeCapua was similarly situated and received a promotion at the time her request was denied. In fact, DeCapua was promoted in August 1996, about one year prior to the time Plaintiff was allegedly denied a promotion. See Grace Declaration, Par. 65c The undersigned concludes that Plaintiff's failure to request or allow a desk audit and thus show that she was in fact

qualified for a promotion, coupled with her inability to demonstrate that someone similarly situated received a promotion when she did not, leads to the failure of her prima facie case. Accordingly, summary judgment should be granted in favor of the Defendant on Plaintiff's claim of racial discrimination with regard to promotions.

Finally Wiley's claim of racial discrimination based upon her assertion that she "believes" the "historical discrimination" against African Americans continues today, and that these practices were in part responsible for her not receiving a promotion to the GS-13 level, merely proffers political and emotional generalizations that do not provide the Court with any admissible evidence to evaluate her claims. Wiley Opposition at 21, n. 12. Unsupported "beliefs" have no legal efficacy. Greene,164 F. 3d at 675. The undersigned recommends that Wiley's claims of racial discrimination should be treated as conceded because she has failed to oppose the Defendant's motion in that respect. See, e.g., Carter v. George Washington University, 180 F. Supp. 2d 97,109 (D.D.C. 2001) (wherein Plaintiff failed in its opposition to allege material facts, disputed or undisputed, that would support a showing of pattern or practice of discrimination); Richard v. Bell Atlantic Corp., 165 F. Supp. 2d 1, 8 n.2 (D.D.C. 2001) (where plaintiff failed to include argument on certain points in her opposition, the court treated plaintiff's arguments as conceded); Waterhouse v. District of Columbia, 124 F. Supp. 2d 1, 3 (D.D.C. 2000).

5. Retaliation

In order to establish a claim for retaliation, Plaintiff must show that she: 1) engaged in a statutorily

protected activity; 2) was subjected to an adverse employment action; and 3) there is a causal connection between the protected activity and the adverse action. Clark County School District v. Shirley Breeden, 532 U.S. 268 (2001); Forman v. Small, 271 F. 3d 285, 299 (D.C. Cir. 2001). A plaintiff can establish a temporal connection between engaging in a protected activity and suffering an adverse action by showing that the defendant had knowledge of the protected activity and the adverse action took place shortly thereafter. Holbrook v. Reno, 196 F. 3d 255, 263 (D.C. Cir. 1999); see also Mitchell v. Baldridge, 759 F. 2d 80, 86 (D.C. Cir. 1985). But see Brodetski,199 F.R.D. 14, 20 (D.D.C. 2001) (holding that for purposes of establishing a causal link, courts generally have accepted time periods of up to a few months).

Plaintiff alleges that she suffered retaliation in connection with three statutorily protected activities in which she engaged. First, she asserts that she met with Maughan, on April 17, 1997, to discuss perceived discrimination. During that meeting, she also "asked [Maughan] for Managing Editor training and to be allowed to act as Managing Editor." Opposition at 9.

After Wiley realized that Maughan was "not going to address the problems [Plaintiffs] had raised, they wrote [a] July 1997 letter ("July 1997 Letter") to Evelyn Lieberman." Id.; see Opposition Exhibit 8 [copy of July 1997 Letter]. The July 1997 Letter voices concern about "the male dominated management of EA, disparate treatment of women, discriminatory evaluations, the lack of women in supervisory roles, lack of training for women in management roles, discriminatory assignments, and an apparent glass ceiling at the GS-12 level for women under Barry Maughan, and Ms. Wiley's denied promotion to GS-13."

Id. at 9.[17]

Plaintiff alleges that the contents of the July 1997 Letter were later "disseminated to VOA staffers by someone other than the Plaintiffs." Id. In response to the July 1997 Letter, some of Wiley's co-workers signed and circulated a November 4, 1997 "Petition in Support of Barry Maughan's Management" ("November 4, 1997 Petition") and a November 7, 1997 "Statement in Support of Barry Maughan" ("November 7, 1997 Statement"). See Exhibits 1 and 2 attached to Defendant's Points and Authorities. These documents reflect staff members' views regarding the July 1997 Letter. The Petition and Statement challenge the veracity of Plaintiff's claims, express concern about the letter's negative impact on the EA Branch's ability to function effectively, and request that management resolve this matter quickly. See id.

Second, Wiley alleges that, in September 1997, she again asked Maughan for a promotion to the GS-13 level and was rejected. She subsequently underwent informal EEO counseling to discuss this denial and at the end of the counseling process, Plaintiff filed a complaint with the Office of Civil Rights. See Opposition Exhibit 11. By letter dated November 20, 1998, the Office of Compliance accepted the following complaints by Wiley for investigation: [d]iscrimination based on "sex (female), race (African-American), national origin (American), reprisal (previous EEO activity), and hostile work environment." Opposition at 10; see also Opposition Exhibit 13 [November 13, 1998 letter from Delia Johnson to James Gee responding to Wiley's EEO Complaint]. Third, Wiley asserts that she sent a letter to Evelyn Lieberman, dated December 17, 1997, [Opposition Exhibit 39] expressing concern over the hostile work environment at VOA.

Wiley alleges that the "adverse [retaliatory] personnel actions taken against [her] include: 1) Mr. Maughan's refusal to allow [her] to act as Managing Editor (Maughan's November 18, 1997 Memo, [Opposition] Exhibit 22 at 2; 2) [Maughan's] refusal to provide [Plaintiff] with On the Job Training for the Managing Editor position ... ; 3) the retroactive taking of leave, . . . and 4) the reduction of Ms. Wiley's air-time responsibilities, . . ." 18 In order to satisfy the "adverse employment action" component of a prima facie case, Plaintiff must demonstrate that Defendant's actions either affected a promotion or caused other tangible or economic loss. See Brown, 199 F. 3d at 456-57 (indicating that actionable employment action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)). See also Singletary v. D. C., 225 F. Supp. 2d 43 (D.D.C. 2002) (after plaintiff engaged in protected activities, he was reassigned, moved to a small office, not given a formal position description, and denied promotions to supervisory positions.)

a. Denial of Training and Opportunity to Act as Manager

Plaintiff's allegations of retaliation relating to denial of training and the opportunity to act as a manager duplicate her underlying claims of discrimination based on training and assignments. Accordingly, the undersigned refers the trial court to its analysis of those claims found in Section III.B.2., whereby the undersigned recommends that summary

judgement in favor or the Defendant be granted.[19] Similarly, with regard to Plaintiff s claims of retaliation based on denial of training and the opportunity to act as a Manager, the undersigned also recommends summary judgment in favor of Defendant.

b. Hostile Work Environment

Wiley's Amended Complaint alleged that she was subjected to a hostile work environment based on her gender. Plaintiff's hostile work environment claim rests upon a joke of a sexual nature sent via electronic mail by DeCapua to Maughan and several other employees on March 9, 1998. Notably, Wiley was not copied on the electronic mail. See Second Wiley Deposition at 206.[20] Maughan testified that he considered the electronic mail inappropriate and he issued a formal Letter of Admonishment to DeCapua. Maughan Declaration, Par. 53. Plaintiff does not recollect any additional electronic mails of this nature sent by DeCapua or anyone else in the EA Branch. Second Wiley Deposition at 207. Plaintiff additionally asserts that Maughan made inappropriate comments relating to women.

To demonstrate that a work environment is sufficiently hostile or abusive, courts look at the surrounding circumstances, including: 1) the frequency of the discriminatory conduct; 2) the severity of the conduct; 3) whether such conduct is physically threatening or humiliating or a mere offensive utterance; and 4) whether the conduct reasonably interferes with an employee's performance. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("'[S]imple teasing, . . . offhand comments and isolated incidents (unless extremely serious) will not

amount to discriminatory changes in the 'terms and conditions of employment.'"; see also Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998) Conduct that is merely offensive is not actionable. Harris v. Forklift Systems, 510 U.S. 17, 21 (1993); see also Raymond v. U.S. Capitol Police Board, 157 F. Supp. 2d 50, 58 (D.D.C. 2001) (The "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code.") (quotation omitted); Russ v. Van Scoyoe Assocs., 122 F. Supp. 2d 29, 32 (D.D.C. 2000) (holding that in the absence of physical contact, sexually explicit and offensive comments were insufficient to substantiate a hostile work environment claim).

In the instant case, Plaintiff alleges that Maughan made sexist comments but Plaintiff does not allege that all of these comments were directed to her or that all such comments concerned her. Furthermore, while Plaintiff may have been offended by Maughan's comments, that is not enough to prove her claim of hostile work environment. Rather, Plaintiff bears the burden of demonstrating that "hostile" actions relate to her gender. See Oncale, 523 U.S. at 80 (citations omitted) ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted [discrimination] ... because of ... sex.") Plaintiff is unable to show that the circulation of one electronic mail or isolated comments made by Maughan rise to the level of hostility or abusiveness [in terms of frequency and severity of challenged conduct, and its effect upon Plaintiff's performance] necessary to support a hostile work environment claim. Moreover, Wiley fails to even mention her gender-based hostile work environment

claim in her Opposition, thus leading the undersigned to conclude that she has abandoned this claim. For these reasons, the undersigned recommends that summary judgment be granted in favor of Defendant with regard to Plaintiff's hostile work environment claim.

C. Motion to Strike

Defendant moves to strike those portions of Plaintiff's Opposition which raise new claims not specifically pled in the Amended Complaint. Specifically, Wiley alleges that Defendant's actions, when viewed together, constitute retaliatory harassment, and furthermore, Defendant retaliated against her by retroactively taking leave from her in 2001 and reducing her air-time in 2002.[22] See Motion to Strike at 1.

1. Retaliatory Harassment

Defendant argues that Plaintiff has an affirmative obligation to put Defendant on notice of her claims, pursuant to Fed. R. Civ. P. 8. Defendant asserts that "[c]ourts have consistently held that it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment." Evans v. McDonald's Corp., 936 F. 2d 1087, 1091 (10th Cir. 1991)(Raising new claims in opposition to summary judgment "waste[s] the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and would unfairly surprise defendants, . . ."); Armstrong v. Reno, 172 F. Supp. 2d 11, 24 (D.D.C. 2001) ("Allowing plaintiff to raise a claim [in his opposition to a motion for summary judgment] after lengthy discovery has been completed would

unfairly prejudice the defendant's ability to defend such a claim.") See also Huskins v. Pepsi Cola of Odgensburg Bottlers, Inc., 180 F. Supp. 2d 347, 353 (N.D.N.Y. 2001); Beckman v. United States Postal Service, 79 F. Supp. 2d 394, 407 (S.D.N.Y. 2000) (both cases involve attempts by plaintiffs to raise claims never addressed in the complaint, by means of an opposition to summary judgment, where defendant had no notice of those claims). Plaintiff distinguishes these two cases on grounds that her claim for retaliatory harassment is not new and unrelated to the existing claims but instead, she is "merely refining her hostile [work] environment claim to reflect that it was retaliatory in nature" and Defendant was therefore clearly given notice of this claim. Opposition to Motion to Strike at 13-14.

Plaintiff further notes that in Evans, 936 F. 2d at 1091, the court found that a claim for retaliatory discharge (which was before the court) and a claim of retaliatory failure to hire (which plaintiff attempted to add in an amended complaint) were "sufficiently unique, as applied to the facts of this case, that ... the late shift in theories caused substantial prejudice to [the Defendant]." Plaintiff distinguishes the instant case on grounds that her claim of retaliatory harassment is "factually identical to her claims of retaliation and hostile [work] environment" and therefore, the Defendant is not prejudiced. Opposition to Motion to Strike at 11,19-20.

Plaintiff also distinguishes the Armstrong case, where the plaintiff therein attempted to add a constructive discharge claim, after lengthy discovery had been completed on his Title VII and Rehabilitation Act claims. In that case, the defendant was not aware that the Armstrong plaintiff was forced to resign from his position as a result of the treatment that he was

made to suffer. Plaintiff asserts that, "[in] contrast, however, Ms. Wiley's claim for retaliatory harassment is premised on the facts that have been before the EEOC and the Court from the outset ... [and] as discussed above, the analysis of her retaliatory harassment case is nearly identical to the analysis of the sex harassment claim." Opposition to Motion to Strike at 12.

Defendant notes that Plaintiff has not sought to amend her Complaint in the instant case, to include her claim for retaliatory harassment nor would such amendment be appropriate since the amendment would result in undue delay and prejudice. Wiley disputes the argument that an amendment would result in undue delay and prejudice. See Harrision v. Rubin,174 F. 3d 249, 253 (D.C. Cir. 1999) ("Where an amendment would do no more than clarify legal theories or make technical corrections, we have consistently held that delay, without a showing of prejudice, is not a sufficient ground for denying the motion ... Unless a defendant is prejudiced on the merits by a change in legal theory ... a plaintiff is not bound by the legal theory on which he or she originally relied.") (internal citation omitted); Atchinson v. D. C., 73 F. 3d 418, 425-26 (D.C. Cir.1996) (discussing decisions pursuant to Fed. R. Civ. P. 15 and weighing the factors of delay and prejudice).

The undersigned finds that Plaintiff's argument supporting the addition of a retaliatory harassment claim is premised on her assertion that "the acts supporting the Plaintiff s retaliatory harassment claim are the same acts that made up the Plaintiff s hostile environment claims, the only difference between Plaintiff's gender-based hostile environment and retaliatory harassment claims is that the harassment was a result of retaliation, rather than gender."

Opposition to Motion to Strike at 10. If the Court accepts Plaintiff's argument that her retaliatory harassment claim is a variation of her prior hostile work environment claim, based on the same assertions supporting her other retaliation claims, such claim must necessarily fail because the undersigned has previously recommended that Plaintiffs hostile work environment and retaliation claims should be denied.

Furthermore, Defendant disputes Plaintiff's assertion that her retaliatory harassment claim is a mere refinement in legal theory. Reply at 6. Defendant acknowledges that while a plaintiff is not required "to have every legal theory or fact developed in detail before the complaint is filed and the parties have the opportunity for discovery," see Wright & Miller, § § 1215, 12190 at 136-147,188-194, the pleading rules do not permit "plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case." Reply at 6, citing Evans v. McDonald's Corporation, 936 F. 2d 1087,1091(l0th Cir.1991). Defendant further contends that it is inappropriate and prejudicial to raise new claims for the first time in submissions in opposition to summary judgment. See Motion to Strike at 4-5 and the cases cited therein.[23]

The undersigned finds that it would be inherently unfair for Plaintiff to assert a new claim in her opposition to the Motion, particularly where Plaintiff has not shown any good cause for such delay and Defendant has alleged that it will be prejudiced by the Court allowing this claim to stand. Accordingly, the undersigned recommends that Plaintiff's claim for retaliatory harassment be denied.

2. Denial of Leave

Plaintiff contends that she provided Defendant with notification of her two additional claims of retaliation. Regarding her claim for denial of leave, Plaintiff filed a pro se pleading, entitled "Plaintiff's Notification of Additional Acts of Reprisal or Related Occurrences," on October 24, 2001, which included a claim that Defendant was retroactively denying Plaintiff leave for attending depositions. Opposition to Motion to Strike, Exhibit 2. On January 10, 2002, Plaintiff filed a formal EEOC complaint relating to the denial of leave. Opposition to Motion to Strike, Exhibit 4. At an October 30, 2002 status conference, the trial court discussed whether Ms. Whey's EEOC claim relating to alleged denial of administrative leave would be consolidated with her discrimination and retaliation claims pending before the trial court. See Opposition to Motion to Strike, Exhibit 3, transcript of October 30, 2002 status conference. Defendant has not indicated that it raised any objection at that status conference or thereafter to the consolidation of the denial of leave claim with the other claims pending before this Court. Defendant subsequently moved to have Wiley's consolidated EEOC claims dismissed with prejudice and the EEOC determined that "because the Complainant has filed a civil action encompassing this matter," the case should be dismissed. Opposition to Motion to Strike at 7, citing December 6, 2002 EEOC Order, attached as Exhibit 6 thereto. Upon examination of the record, the undersigned concludes that the parties, the EEOC, and trial court anticipated that Plaintiff's denial of leave claim would be consolidated with the other claims pending before this Court. Defendant's argument that it did not have timely notice of this claim, and is thus prejudiced, should be rejected.

Defendant asserts that Plaintiff failed to exhaust her administrative remedies regarding her annual leave claim. See Motion to Strike at 17, n.10, citing Supplemental Johnson Declaration, Pars. 12-19.

Claims involving retaliation however do not necessarily require the exhaustion of administrative remedies. See, e.g., Sussman v. Tanoue, 39 F. Supp. 2d 13, 21 (D.D.C.1999) ("most courts have concluded plaintiffs are not required to exhaust administrative remedies for claims of retaliation which arise following the filing of administrative complaints"); Webb v. District of Columbia, 864 F. Supp. 175, 184 (D.D.C. 1994). See also McKenzie v. Illinois Department of Transportation, 92 F. 3d 473, 481-83 (7th Cir.1996) ("[A] double filing [i.e., 2 EEOC charges] would serve no purpose except to create additional procedural technicalities . . . .") Accordingly, the undersigned recommends that Wiley's claim of retaliation based on retroactive taking of leave be treated as an exception to the general rule requiring exhaustion of administrative remedies, also on grounds that Defendant had notice of this claim and made no objection to consolidating this claim with the other claims pending before the trial court.

Defendant next argues that even if Wiley's annual leave claim is properly before this Court, such claim is subject to dismissal for two reasons. Motion to Strike at 17. First, Defendant argues that "5 U.S.C. §6322 does not entitle Ms. Wiley to annual leave for attending depositions of non-party witnesses and her co-plaintiffs." Id. Section 6322 of Title 5 of the United States Code states that an employee is:

> [E]ntitled to leave, without the loss of, or reduction in, pay, leave to which he is otherwise

> entitled ... during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve - (1) as a juror; or (2) ... as a witness on behalf of any party in connection with any judicial proceeding to which the United States, the District of Columbia or a state or a local government is a party.

5 U.S.C. Section 322. See also Moore v. Summers, 113 F. Supp. 2d 5, 28 (D.D.C. 2000) (plaintiffs not entitled to paid administrative leave when they sought to attend the deposition of agency's designee); Shelborne v. Runyon, 1997 U.S. Dist. LEXIS 13583, *51 (D.D.C. Aug. 21, 1997) (citation omitted). Moreover, Opposition Exhibit 37 (memorandum relating to agency administrative leave policy) reveals that Defendant's existing agency policy did not provide for administrative leave to be given in connection with Plaintiff's attendance at a deposition. Defendant argues that "[a]dherence to an established agency policy regarding administrative leave goes a long way in rebutting any inference of discrimination or retaliation that might otherwise be drawn from the denial of paid leave." Moore, 113 F. Supp. 2d at 28 (citing Batson v. Powell, 912 F. Supp. 565, 579 (D.D.C. 1996), aff'd., 203 F. 3d 51 (D.C. Cir. 1999)).

Second, Defendant asserts that Wiley has "provided no evidence to support her claim that she was ever charged 62 hours and 15 minutes of annual leave to attend the depositions of nonparty witnesses."[24] Defendant accordingly argues that Wiley's annual leave claim must be dismissed because: 1) she was not entitled to paid administrative leave to attend the

deposition of non-party witnesses and her co-plaintiffs, and 2) there is no evidence that any adverse personnel action ever took place.

Plaintiff rebuts Defendant's allegations in a manner sufficient to avoid having this claim stricken. Wiley alleges that the existing Agency "policy" was not clearly defined until long after she relied on the Defendant's advice and attended the depositions. Opposition at 19-20. See Opposition Exhibit 35, electronic mail from William Ohlhausen ("Ohlhausen"), Agency Deputy General Counsel to Plaintiff (stating that he is unaware of an official policy relating to administrative leave for attendance at depositions but that he would check with someone else and get back to the Plaintiff). According to Plaintiff, neither Ohlhausen nor any other representative from the General Counsel's office subsequently contacted her. Wiley Declaration at T9, attached as Opposition Exhibit 33. Furthermore, it was not until October, 2001, following the conclusion of the depositions attended by Wiley and eight months after Wiley spoke to Ohlhausen that the Office of Civil Rights issued "Guidelines for Complainants and Managers Regarding Use of Official Time to Participate in Proceedings Before the OCR, the EEOC, or Federal Courts." See Opposition Exhibit 37. According to Wiley, these Guidelines clarify that only the Plaintiff's own deposition qualifies for paid administrative leave.

Wiley further contends that she was in fact denied administrative leave and was subsequently charged with annual leave .[25] See Wiley's Opposition to Motion to Strike, Exhibit 7, which is an Earnings and Leave Statement for the pay period ending November 17, 2001. Wiley asserts that Exhibit 7 shows that she was "charged with 72-hours of annual leave ...

includ[ing] the approximately 56-hours that was originally granted as administrative leave." Opposition at 25. Because there is an unresolved dispute as to whether Wiley's administrative leave was rescinded, the undersigned recommends that Defendant's motion to strike the Plaintiff's allegations relating to retaliation based on denial of administrative leave be denied.

3. Reduction in Air-Time

Plaintiff contends that she likewise provided Defendant with notice of her reduction in air-time claim. In June 2002, "Ms. Wiley contacted the Agency's [OCR] alleging in an informal complaint of discrimination that her air time in the one-hour versions of [AWT] radio show was reduced when Ms. McMenamin (1) moved an editorial segment into the back half of that radio show and (2) expanded the special coverage of the World Cup Soccer sports segment in the back half of that radio show by three minutes. Motion to Strike at 21, citing Second Supplemental Johnson Declaration, Par. 20. On July 24, 2002, Wiley received a Notice of Right to File a Discrimination Complaint pursuant to 29 C.F.R. § 1614.105. Wiley, however, never filed a formal complaint of discrimination with regard to these claims, and in fact, on August 27, 2002, she withdrew her informal complaint of discrimination. Defendant argues that Wiley failed to exhaust her administrative remedies and she cannot now "seek to resurrect this claim in district court having wholly failed to exhaust her administrative remedies." Motion to Strike at 21. See Antis v. Greenspan, 158 F.3d 1301 (D.C. Cir. 1998) ("[W]hen the agency is not given the opportunity to

reach the merits of an EEOC claim, federal courts will not reach [the] merits either.") See also Powell v. Reno, 1999 U.S. Dist. LEXIS 18134, *6 (D.D.C.1999) ("[A] plaintiff who abandons the administrative process midstream prevents exhaustion and precludes judicial review of those claims.") (citation omitted).

Wiley disputes that her voluntary withdrawal of the EEOC complaint alleging a reduction in on-air responsibilities demonstrates that she did not exhaust her administrative remedies.[26] Instead, she attempts to distinguish the cases cited by Defendant. Plaintiff argues that Artis stands for the proposition that "by participating in the informal EEO process, the claimant provided the Defendant with the opportunity to pursue a mutually satisfactory resolution with the employee as required by Loe." Opposition to Motion to Strike at 28. Plaintiff further contends that, unlike herself, the complainant in Artis failed to cooperate with the EEO office at the informal stage and as in Powell, the complainant failed to comply with repeated requests for information and affidavits from the EEOC investigator before his case was dismissed for failure to prosecute. Powell at *7. In contrast, Plaintiff argues she fully participated in the informal EEO process with regard to her reduced on-air responsibilities complaint, put Defendant on notice of the acts she believed to be in violation of Title VII, and participated in efforts to resolve her claims informally.

In this Circuit, the doctrine of exhaustion of administrative remedies limits the scope of a Title VII lawsuit following an EEOC complaint to claims that are "like or reasonably related to the allegations of the charge and growing out of such allegations." Id. at 21-22, citing Park v. Howard Univ., 71 F.3d 904-907 (D.C. Cir. 1995) (citation omitted). See also Brown v. Marsh,

777 F.2d 8, 14 (D.C. Cir.1985). Under circumstances where the employer was afforded notice that its actions violated Title VII and was given adequate opportunity to pursue a mutual resolution with the employee, new retaliation claims made before the court might survive an inquiry into administrative exhaustion. Loe v. Heckler, 768 F. 2d 409 (D.C. Cir.1985); Harrison v. Rubin, 174 F. 3d 249 (D.C. Cir.1999).

Wiley argues that the doctrine of notice pleading permits her to include subsequent acts of retaliation and furthermore, Rule 8(a)(2) requires only that the defendant have "fair notice" of the plaintiff's claim. See Opposition to Motion to Strike at 2, citing Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002). See also Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191(D.D.C. 2002) (stating that "exhaustion is not an end in itself; it is a practical and pragmatic doctrine that must be tailored to fit the peculiarities of the administrative system Congress has created [and] [e]xhaustion under Title VII, like other procedural advices, should never be allowed to become so formidable a demand that it obscures the clear congressional purpose of rooting out ... every vestige of employment discrimination within the federal government.") Opposition to Motion to Strike at 26.

Plaintiff concludes that because Defendant was given "notice that the reduction in on-air responsibilities was in retaliation in violation of Title VII, and an opportunity to resolve the claim, the purpose for exhaustion has been fulfilled, and Ms. Wiley's claim should be allowed to proceed." Opposition to Motion to Strike at 31. Defendant asserts however that "plaintiff's claims [of] gender discrimination with respect to a 1997 promotion request and retaliation regarding evaluations, promotions, training and

assignments while Mr. Maughan was her supervisor [fail to] embrace future ... discrete incidents with respect to air-time responsibilities by a different supervisor" with the effect that Defendant did not receive notice of the reduced air-time claim. Motion to Strike at 22-23.

Reviewing the record before this Court, the undersigned finds that Plaintiff has not exhausted her administrative remedies regarding her retaliation claim based on reduced air time nor was Defendant given appropriate notice of the claim so as to waive any exhaustion requirement. Accordingly, the undersigned recommends that Defendant's Motion to Strike be granted insofar as it relates to Plaintiff's claim for retaliation based on reduced air-time.

D. Motion to Strike Exhibits

Defendant moves to strike several exhibits offered by Plaintiff in support of her Opposition to Defendant's Motion; specifically Exhibits 30, 31, 35, 36, 37, 40 and paragraphs 1 and 9 of Wiley's Affidavit [Exhibit 33]. Paragraph 1 of Wiley's Affidavit relates to her claim of reduced air-time and paragraph 9 relates to her administrative leave claim. Consistent with the undersigned's aforementioned recommendations, the undersigned recommends that paragraph 1 be stricken and paragraph 9 remain. The undersigned makes no recommendation as to whether the remaining exhibits should be stricken but instead suggests that the Defendant may move in limine to exclude any of the contested exhibits that remain at issue after the trial court accepts or rejects this Report and Recommendation.

IV. CONCLUSION

For the reasons set forth in detail in this Report and Recommendation, the undersigned recommends that Defendant's Motion to Dismiss Plaintiff's allegations of misconduct by OCR be granted. The undersigned further recommends that Defendant is entitled to summary judgment on Plaintiff's discrimination claims based on: 1) performance evaluations; 2) training and assignments; 3) discipline in the workplace; and 4) failure to be promoted. The undersigned finds that Defendant is further entitled to summary judgment regarding Plaintiff's claims of retaliation based on allegations of denial of training and the opportunity to act as a manager, and Plaintiff's claim of hostile work environment.

The undersigned recommends that Defendant's Motion to Strike be denied with regard to Plaintiff's retaliation claim that leave was retroactively taken from her, but that such motion be granted regarding Plaintiff's retaliatory harassment claim of reduced air-time. The undersigned additionally recommends that Defendant's Motion to Strike be granted in connection with Plaintiff's claim of retaliatory harassment.

Regarding Defendant's Motion to Strike Exhibits, the undersigned recommends that Paragraph 1 of Wiley's Affidavit [Exhibit 33] be stricken while Paragraph 9 of Wiley's Affidavit should remain intact. The undersigned concludes that consideration of the remaining contested exhibits [numbered 30, 3 l, 35, 36, 37, and 40] should be deferred until after the trial court accepts or rejects this Report and Recommendation, which may moot the utility of some or all of those documents. Defendant may then move in limine to

strike any of those remaining contested exhibits.
DATED: May 25, 2004
ALAN KAY
UNITED STATES MAGISTRATE JUDGE

Footnotes

[1]This case initially involved claims by three Plaintiffs but the other two Plaintiffs settled with Defendant and dismissed their claims. Verla Wiley is the sole remaining Plaintiff.

[2] On June 16, 1999, Plaintiff filed an Amended Complaint.

[3]On October 1, 1999, the USIA was abolished as part of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law No. 105-277), and the international broadcasting arms of USIA, which included Voice of America, Worldnet Television and the Office of Cuba Broadcasting, continued under a newly-created independent federal agency known as the Broadcasting Board of Governors. Defendant's Points and Authorities in support of Motion at 3. All references to Defendant's Points and Authorities refer to the abridged copy filed on October 22, 2003, which discusses only Wiley's claims.

[4]Donna Grace is a Human Resources Specialist in the Office of Personnel, Labor and Employee Relations Division, Broadcasting Board of Governors.

[5]The show is divided into 15 minute segments, each designated with a letter and focusing on a different issue. Maughan Declaration, TT6-7. The "back half 'of an hour long show would be the "C" and "D" segments.

[6] Rebecca McMenamim was the Chief of the EA Branch in November 2001 when her Declaration was filed. She assumed this position in June 1999.

[7]The GS-13 IRB positions may or may not be supervisory. Grace Declaration, Par. 10; Maughan Declaration, Par 10.

[8]Delia Johnson has been the Director of the OCR Broadcasting Board of Governors ("BBG") since the creation of BBG in October 1999.

[9]Although Plaintiff names Lucas in her administrative complaints, she raises no specific claims against him. Defendant's Points and Authorities at 10, n.14.

[10]Charlotte Large is a Human Resource Specialist (Benefits) in the Agency's Office of Personnel Operations Division

[11]Furthermore, Plaintiff did not address this issue during the hearing on this Motion.

[12]Wiley's responsibilities as the newly elected union vice-president "precluded her ability to function as a managing editor" as she concedes in her First Deposition at 34-35 ("Q: And because you had more responsibilities as vice president of the union, you couldn't do that and be managing editor, too? A: Right. That's correct.") Wiley also testified that being union vice president was "demanding ... on her time." Id. at 35-38 (explaining how she could be pulled away from IRB responsibilities to attend to union matters); see also Second Wiley Deposition at 280-81 (stating that in September 1997, she was going through "traumatic and

demoralizing" union negotiations, that she was in negotiations all day long, every day.) Furthermore, Wiley noted that she could be away from the EA Branch for a week or six weeks, depending on the nature of the union negotiations. Second Wiley Deposition at 281.

[13] Plaintiff appears to have abandoned this claim because her Opposition does not address this issue nor was argument proffered during the oral hearing on this Motion.

[14]Defendant additionally asserts that with regard to these three claims [numbered 111. B. 1., 2., and 3.], Plaintiff does not satisfy the third prong of a prima facie case insofar as she is unable to demonstrate that similarly situated employees, who are not members of her protected class, were treated differently. See Defendant's Points and Authorities at 28-29, citing Holbrooke v. Reno, 196 F. 3d 255, 261(D.C. Cir. 1999); Paul v. Federal National Mortgage Association, 697 F. Supp. 547, 553 (D.D.C.1988). In fact, Defendant argues that Wiley is not similarly situated to any of her colleagues "[b]y virtue of her different duties and position as union vice president" whereby she "balances her time between preparing for the "C & D" section of Africa World Tonight ... and working for the union." Id. at 29, citing First Wiley Deposition at 39. The undersigned need not address the third prong issue because Plaintiff's prima facie case fails based on her inability to demonstrate any adverse effect arising from any purported discrimination.

[15]Maughan testified that he "participated in the decision to promote Joseph DeCapua" but it was the branch

chief who made the decision on the promotion. Maughan Deposition at 44. [16]Wiley relies upon the decision in Bundy v. Jackson, 641 F. 2d 934, 951 (D.C. Cir. 1981) for the proposition that Plaintiff need not show that she was similarly situated to Decapua but instead she need only show that they had similar qualifications and further, that DeCapua was promoted at the time that Plaintiff's request for promotion was denied. In Bundy, the court stated that "[q]ualification for promotion, of course, may not be a strictly precise concept, and will depend on the rules and customs of a particular employer ... On the other hand, there can be no absolute precise and uniform time period before and after the denial of the complainant's promotion during which time plaintiffs must show that a similarly qualified nondisadvantaged employees were promoted." Id. at 951. Wiley then makes a general conclusion that she and DeCapua had similar qualifications because "[b]oth had significant experience in the radio broadcast industry; both were international Radio broadcasters, and both were GS-12s prior to their promotion (or non-promotion)." Opposition at 26. Wiley does not offer any record evidence comparing her qualifications with DeCapua's qualifications, such as whether they both had the same position description. The mere assertion that Plaintiff and another employee were both long term employees, with the same grade and in the same general area of activity is insufficient to support a claim of "similarly qualified."

[17]Defendant disputes that there is a causal connection between the protected activity and the adverse action, based on Wiley's own deposition testimony. Wiley testified that she believed she was being denied managing editor duties because of racism and

retaliation "for her union activities" as opposed to such denial resulting from her complaints to then-VOA Director Evelyn Lieberman or the Defendant's OCR. Second Wiley Deposition at 331.

[18]Items three and four will be addressed later in this Report and Recommendation.

[19]In addition to the arguments asserted by Defendant in connection with Plaintiff's discrimination claims, Defendant asserts that Plaintiff cannot satisfy the third element of the prima facie case for retaliation requiring her to demonstrate a causal connection between her protected activity and the adverse action. More specifically, while Wiley alleges that she engaged in protected activities in July 1997, October 1997 and December 1997, her request to undertake managing editor duties presumably occurred in "1996 to '97, and then especially ... after ... we talked to Barry [Maughan] in April of '97." First Wiley Deposition at 30. Her request for managing editor duties therefore occurred prior to the time when she engaged in any protected activity. Defendant accordingly disputes Wiley's claim that she was "denied the Managing Editor position after she made her protected complaints." Opposition at 34 (emphasis added).

[20]Ms. Depew, the only woman to whom the electronic mail was addressed, testified that she did not find the joke sexually offensive. Depew Declaration, Par. 16.

[21]For example, Maughan commented that women should be "barefoot and pregnant;" he referred to women as "gals;" and he commented on Wiley's breasts. Opposition at 29-30; see also Defendant's Points and

Authorities at 83-84.

[22] In order to prove a pima facie case of retaliatory harassment, a plaintiff employee must demonstrate that: 1) he or she is a member of a protected class; 2) the employee was subject to unwelcome retaliatory harassment; 3) the harassment was based on the employee's protected activity; 4) the harassment created a hostile work environment; and 5) the employer failed to take reasonable care to prevent and correct any harassing behavior. Singletary v. D. C., 225 F. Supp. 2d 43 (D.D.C. 2002).

23 Defendant further agues that because of the advanced stage of this case, Plaintiff should not be granted leave to amend her complaint pursuant to Fed. R. Civ. P. 15 (a) to add any of these new claims. Motion to Strike at 5. Plaintiff counters that if she must move to amend her Complaint to allege her retaliatory harassment claim, leave should be freely given because no undue delay or prejudice will result. It is premature for the undersigned to consider this issue before Plaintiff has moved to amend her Complaint.

[24]Wiley asserts that "[l]ost leave is an adverse employment action on which a claim can be made under Title VII." Opposition to Motion to Strike at 25. Defendant acknowledges that being improperly charged with annual leave, on its face, alleges an act that could be considered an adverse action. Reply to Opposition to Motion to Strike at 17.

[25] Defendant denies that Exhibit 7 shows that Wiley was denied administrative leave and charged with annual leave but fails to proffer evidence to rebut

Plaintiff's claim.

[26]Wiley indicates that she moved to dismiss her outstanding EEOC claims so that they could be prosecuted before this Court and further, "the EEOC correctly understood that the acts of retaliation had been included in the District Court case, [when] it dismissed Ms. Wiley's EEOC action stating: Notice is hereby given that the ... case is dismissed ... because the Complainant had filed a civil action encompassing this matter." Opposition to Motion to Strike at 30.

Civ. No. 99-975 (TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

KEMI SOUTHEY-COLE, et al.
Plaintiffs,
v.
KENNETH Y. TOMLINSON, Chairman, Broadcasting Board of Governors,
Defendant.

ORDER

Upon consideration of the Magistrate Judge's Report and Recommendation of May 26, 2004 [#167], as well as the objections, response, and replies thereto from the parties, it is hereby ORDERED that the Report and Recommendation is ADOPTED IN FULL. Accordingly, it is hereby

ORDERED that Defendant's Motion to Dismiss and Motion for Summary Judgement are GRANTED. It is further

ORDERED that Defendant's Motion to Strike is DENIED as to Plaintiff's claim regarding denial of leave and GRANTED as to Plaintiff's claims regarding retaliatory harassment. It is further

ORDERED that Defendant's Motion to Strike Exhibits is GRANTED as to Paragraph 1 of Wiley's Affidavit and DENIED as to Paragraph 9 of Wiley's Affidavit. Finally, it is

ORDERED that a status conference shall take place on Wednesday, June 8, 2005 at 11:30 a.m. to discuss the remaining claim.

SO ORDERED.

May 6, 2004
Thomas F. Hogan Chief Judge